

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,720

IRENE B. WABISKY,
Individually and as Ancillary Administratrix of the
Estate of Joseph L. Wabisky, deceased,

Appellant,

v.

D. C. TRANSIT SYSTEM, INC.,
(a corporation)

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

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(i)

QUESTIONS PRESENTED

1. Did the Court comment fairly on the evidence when it detailed testimony which supported defendant's version of the accident, and failed and refused to detail testimony which supported plaintiff's version of the accident?

2. Did the Court comment fairly on the evidence when it reviewed the operator's statement that the decedent had walked into the streetcar, but refused to review for the jury the testimony of the police officer that the operator had stated immediately after the accident that the decedent had not walked into the streetcar?

3. Did the Court err when it failed to grant the jury's request to have the testimony of the police officer read to them (such testimony being readily available in Court) and then answered incorrectly the question of the jury as to whether the point of impact was on the edge or the flat side of the streetcar, particularly since the police officer's testimony contained the correct answer to such question?

4. Did the Court err in refusing to admit into evidence Section 22 of the Traffic Regulations when there was evidence that (1) a special hazard existed with respect to the pedestrian, and (2) the operator admitted picking up speed on two occasions as he approached such pedestrian.

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Individually and as Ancillary Administratrix of the
Estate of Joseph L. Wabisky, deceased,

Appellant,

v.

D. C. TRANSIT SYSTEM, INC.,
(a corporation)

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the District of Columbia entered on January 11, 1963 in favor of appellee, D.C. Transit System, Inc., a corporation, against appellant, Irene B. Wabisky, Individually and as Ancillary Administratrix of the Estate of Joseph L. Wabisky, deceased, in an action for wrongful death.

This Court has jurisdiction pursuant to Section 1291, Title 28, United States Code.

STATEMENT OF THE CASE

The plaintiff's decedent was struck and killed by defendant's streetcar which was proceeding east on Pennsylvania Avenue, Northwest. The accident took place on Pennsylvania Avenue near the 13 1/2 Street cross-walk.

This is the second appeal of this case. At the first trial, the trial court held that the plaintiff had not made out a case and directed a verdict at the conclusion of the plaintiff's evidence. On appeal this Court reversed and remanded for a new trial on the ground that the plaintiff had made out a case under the "last clear chance" doctrine. Wabisky v. D.C. Transit System, ____ U.S. App. D.C. ____ (No. 16884, dec. October 25, 1962). In such opinion the Court said that certain "testimony of the police officer as to statements made by the operator and the testimony of the passenger of the streetcar as to what he observed were for the jury to evaluate." This Court said that "the weight of this testimony and the credibility were for the jury, not for the court." (op. p. 3). This Court directed a new trial "not inconsistent with this opinion."

At such new trial, it was undisputed that the deceased intended to cross Pennsylvania Avenue from south to north near the east line of 13 1/2 Street. Painted lines marked out a so-called "safety zone" within that portion of the crosswalk south of the east-bound streetcar tracks (J.A. 8). The safety zone measured 20 feet wide by 5 feet deep. There was approximately 3 feet between the north line of the safety zone and the south rail of the track.

The following facts were also undisputed: The streetcar had come to a halt about 150 feet from the safety box, waiting for the 13 1/2 Street traffic signal to change from red to green. At such time, the operator saw the deceased facing away from the streetcar and looking in the opposite direction. The traffic signal changed to green and the car proceeded east. As the car approached, the

operator rang his bell several times to attract the decedent's attention. However, the operator was unable to attract the attention of the deceased who continued to look east away from the streetcar (J.A. 37-38). The operator had "taken off" at about 10-12 miles per hour, but picked up speed when he was abreast of the decedent (J.A. 38).

The said streetcar is so constructed that the front portion thereof is the narrowest part. The streetcar thereafter tapers outward to its widest dimension, which is located just back of the front door. Such point is 9 1/2 inches wider than the narrower front element of the streetcar. The streetcar overhangs the track 14 1/2 inches at its widest point - which is just to the rear of the front door - and by 6 inches at its narrowest point. At such widest point a metal edge extends 2 1/2 inches out from the body of the streetcar (J.A. 13-14, Tr. Vol. I, p. 67).

The decedent was struck in his forehead area (J.A. 13). The point of impact on the streetcar was at a point 5 feet 8 inches from the ground and 7 feet 3 inches to the rear of the foremost part of the streetcar. This was identified as being the metal edge located just to the rear of the front doors and was at the widest dimension of the streetcar (J.A. 14).

The operator did not actually see the pedestrian come into contact with the car, but he heard a thump after the doors passed the decedent (J.A. 17-18).

Immediately after the operator heard the thump he applied the streetcar's emergency braking system and brought the streetcar to a stop when its front was 53 feet from the east crosswalk line, and its rear was 11 feet east of the east crosswalk line (J.A. 15, 17).

The streetcar was equipped with three separate braking systems, all of which were in good and proper working condition (Tr. Vol. I, p. 56-58).

It was further undisputed that the operator could have stopped the streetcar within 50 feet at 20 miles per hour and within 23 1/2 feet at 10 miles per hour (Tr. Vol. I. p. 63-64). The streetcar traveled 61 feet from the point of impact (J.A. 15). This would indicate a speed of 16 1/2 miles per hour (Tr. Vol. I. p. 64).

As stated, all of the above evidence was uncontradicted. But there was a sharp conflict as to where the decedent stood and what he did prior to being hit. The operator testified at the trial that the decedent walked northward about the middle of the eastbound lane and came to a stop in the safety box, where he remained (J.A. 33). The operator testified that the pedestrian remained stationary with his head turned toward the Capitol (in the opposite direction) as the streetcar approached, but that he observed through his front doors that as the streetcar got abreast of the decedent, such decedent "seemed to turn and step forward toward the streetcar" (J.A. 35).

This most important testimony was directly contradicted by the police officer who investigated the accident and interrogated the operator at the scene of the accident minutes after it had happened. Such officer testified that he asked the operator if the decedent had stepped into the streetcar, and that the operator replied that he could not say that the man stepped into the car, and that he did not see him step. The operator said that as the streetcar doors passed the decedent, all he saw was that the decedent turned the upper part of his body and head in the direction from which the streetcar was coming (J.A. 17-18).

There was additional conflicting evidence from passengers on the streetcar. One passenger (Walker) testified that she saw the pedestrian standing in the safety zone and that he walked right into the car. But the witness had testified at the inquest 3 days after the accident that the decedent had stepped in front of the streetcar (Tr. Vol. II, p. 10-12). And it was conceded by all

parties that the decedent had not come in contact with the front of the streetcar but at a point 7 feet 3 inches from the front.

Another passenger (Nolin) testified that the decedent was standing halfway between the track and the safety box when the streetcar began its approach from 150 feet away and did not move as the streetcar approached. The witness testified that he kept the decedent in his view all of the time except for a fraction of a second when the front of the streetcar obscured his view (J.A. 25, Tr. Vo. I. p. 31). Written answers to a questionnaire made by an investigator for the D.C. Transit Company was produced. The answers in such questionnaire were written in the handwriting of the investigator and the document was signed by the witness. It contained a statement (in the handwriting of the investigator) that the witness did not see the man until after the thump. The witness testified that he had told the investigator that the decedent had not moved and that there came a time when he had lost the decedent from his view. On redirect examination counsel for plaintiff asked the witness what he had meant by that statement. The Court refused to permit such question.

The Court's instruction to the jury is set out at J.A. 40-51. During such instruction, the Court commented on the evidence as follows:

"This brings me to a discussion and a summary of the evidence on this vital point . . .

There are two versions, however, as I see it, as to exactly how this accident happened, and you, of course, will have to decide which is the correct version. According to the defendant, what happened was as follows: The deceased reached the safety zone while endeavoring to cross Pennsylvania Avenue and he stopped. The streetcar was proceeding eastward on Pennsylvania Avenue. It had stopped at the intersection immediately west of 13 1/2 Street for a red light. The light for vehicular traffic on Pennsylvania Avenue then changed to green and the walk light for pedestrians showed

'Don't Walk.' The streetcar started then. The motorman claims that he saw the deceased standing in the safety zone, standing still. The motorman sounded the gong several times. It is not disputed that the gong was sounded several times, in order to warn the deceased that a streetcar was coming. However, the defense claims that after the front doors of the car passed the deceased, the deceased carelessly started to walk forward and came into contact with the side of the car at a point where the car was slightly wider than its front because the car was streamlined, and as a result of the contact the deceased was thrown into the air and shortly thereafter was pronounced dead.

If this version is the correct version of what happened, then your verdict must be for the defendant, because clearly under those circumstances the defendant would not be at fault. There would have been no negligence on the part of the motorman, the deceased would have been guilty of contributory negligence, and the doctrine of the last clear chance would not have come into play.

The law is that until a reasonable man would conclude otherwise, a streetcar motorman is entitled to assume that an adult pedestrian is oriented, is aware of his surroundings and would not suddenly leave a place of safety and move against a don't walk sign into the path of an oncoming streetcar which is giving notice of its approach. If you find that Mr. Wabisky suddenly left the safety zone against such a sign, in this case you will return a verdict in favor of the defendant.

However, we have another version of this accident and, as I said before, it is for you to decide which is the correct version. The plaintiff's version is somewhat different. The plaintiff claims that the deceased did not stand still in the safety zone but that he stopped and stood in the narrow space two feet nine inches wide between the safety zone and the track and, therefore, was in a position of danger and that, therefore, the motorman should have been aware, in the exercise of reasonable care, that the deceased was in a position of danger, was oblivious to it or unable to extricate himself, and that the motorman should have, by the exercise of reasonable care, avoided the accident, perhaps by bringing the car to a stop.

Now, that is the plaintiff's contention, and if you find the facts to have been as the plaintiff claims them to have been, then you would have a right to find a verdict in favor of the plaintiff.

Now, then, what is the evidence as to these respective versions? There were three witnesses introduced who claimed to have seen the pedestrian, that is, the deceased, immediately before the accident. One, of course, was the motorman.

The motorman, in substance, testified, Mr. Jimmy Lane, that after stopping west of 13 1/2 Street for a red light he started to proceed on the green light. He had seen the deceased walking north across Pennsylvania Avenue in the east-bound lane until after the streetcar started. The motorman further testified that he sounded his gong, slowed down his car, that the deceased was looking in the opposite direction, towards the Capitol, and that after the front doors of the car passed the deceased he saw the deceased step forward towards the car and come in contact with the side of the car.

Now, the next witness -- well, I am not taking them in order. Another witness was Lucien Nolin, a gentleman who was a passenger in the streetcar. He testified that he saw the deceased standing not in the safety zone but in the narrow space between the track and the safety zone and that the deceased did not move, and then Mr. Nolin testified that he heard a bang and he saw the deceased fly into the air. Now, on cross-examination, however, Mr. Nolin admitted that he was somewhat confused as to the details of the accident. On the afternoon on which the accident took place he was interviewed by an investigator of the D.C. Transit System and a statement of what he told the investigator was prepared, which Mr. Nolin signed. That statement ends with the following sentence: 'I did not see this man until after I heard the thump and looked out and saw him flying through the air.'

It is for you to determine what weight to attach to Mr. Nolin's testimony.

The third and last witness who saw the man before the accident was Florence Walker. She, too, was a passenger. Florence Walker testified that she saw the pedestrian standing in the safety zone and that he then walked right into the side of the car, about, she said, the middle of the car. Her testimony was corroborated by the

testimony of Margaret Stearns, another passenger, who overheard Florence Walker exclaim, 'He walked into the car.'

So there you have the two versions of the accident, and it is your function to decide which is the correct version. You have to determine where the truth lies and what the fact was."

At the conclusion of the charge to the jury, counsel for the plaintiff asked the Court to make some reference to the testimony of the police officer which the Court had totally omitted from its comments, stating to the Court:

"... the policeman said that the driver had told him that the decedent had not stepped but merely turned. That is very important to our version of the case, Your Honor."

The Court refused to comply with this request and stated to counsel:

"Well, you argued that to the jury. I don't think I need say anything about it." (J.A. 50-51).

The jury deliberated for a substantial period of time. In the course of its deliberations it sent a note to the Court as follows:

"We would like to have the transcript of Officer Mason's testimony. If that is not possible, we would like to know where the dimension 7 feet 3 inches was measured from. We would like to know where precisely the piece of one square inch straw was found." (J.A. 51).

The Court did not see fit to have the transcript of the police officer Mason's testimony read to the jury. Through its Foreman, the jury then inquired as to whether the point of impact was the edge or on a flat side of the car (J.A. 56). Although counsel for the plaintiff correctly recollected that such point came at the molding (J.A. 57), counsel for the defendant disagreed with such recollection. Thereupon

the Court refused to answer the jury's question or have the transcript of evidence read on the ground that counsel for the defendant had disputed the correct recollection of plaintiff's counsel.

The jury later returned a verdict for the defendant.

STATEMENT OF POINTS

1. The Court erred in unfairly commenting on the evidence in that the Court did not fully explain to the jury the contentions of both parties with respect to the evidence.

2. The Court erred in failing to grant the jury's request that the transcript of the testimony of witness Mason be read to them.

3. The Court erred in answering incorrectly question put to the Court by the jury as to the precise point of contact on the streetcar.

4. The Court erred in refusing to admit into evidence Regulation 22(c), Traffic and Motor Vehicle Regulations of the District of Columbia.

5. The Court erred in refusing to allow witness Nolin to explain a portion of his written statement.

6. The Court erred in excluding testimony that defendant's investigator approached witness Nolin prior to trial.

SUMMARY OF ARGUMENT

The Court unfairly commented on the evidence and thereby gave the jury a one-sided review of the testimony adduced at trial.

The Court committed error by not answering properly an inquiry of the jury. The jury asked to rehear the testimony of a witness. The Court refused to grant such request and gave to the jury what the Court termed the substance of the witness' testimony. Such substance of testimony was incomplete and inaccurate.

The Court committed error in failing to admit into evidence the applicable traffic regulation with respect to speed of a vehicle when the testimony was that the vehicle in question was picking up speed at the time of the accident.

ARGUMENT

I

THE COURT COMMENTED UNFAIRLY ON THE EVIDENCE AND WEIGHTED ITS COMMENTS IN FAVOR OF THE DEFENDANT AND UNFAVORABLY TOWARD PLAINTIFF

During its instructions to the jury the Trial Court made certain comments on the evidence. The plaintiff concedes that the Court had the clear right to comment; but the plaintiff submits that the Court's comments were one-sided and not fairly made.

The record shows that the Court weighted its comments in favor of the defendant. The Court stated the defendant's evidence in its most favorable light, ignored all testimony adverse to the defendant, and stated the plaintiff's evidence in its most unfavorable light without stating its favorable implications. In short, the Court acted as a most effective advocate for the defendant.

This case revolved around whether or not the decedent had walked into the streetcar from within the safety box (approximately 3 feet away) or was between the safety box and the streetcar rail as the car approached and merely turned his head and the upper portion of his body in the direction of the streetcar as the object bore down upon him.

Obviously, the best witness available was the streetcar operator who admitted having the decedent in his direct view for over 150 feet and saw him continuously and clearly while the streetcar traversed such distance, until the front doors of the streetcar passed the decedent. At the trial the streetcar operator testified that as the front side doors passed the pedestrian "he seemed to turn and step forward toward the streetcar" (J.A. 35).

But he had made a directly contrary statement before. Within minutes after the accident the operator had been interrogated by the police officer investigating the accident. Such police officer testified as follows:

"Now, I asked this operator if the man had stepped into the streetcar. He said he couldn't say the man stepped. He didn't see him step. All he could say was he noticed the man turning his upper part and his head like that . . . back toward the direction in which he was coming" (J.A. 18).

The testimony of the police officer was obviously vital to the plaintiff's case for it showed that immediately after the accident the operator had admitted that the decedent had not walked into the streetcar. The police officer's testimony showed that the operator's testimony at the trial, that the decedent had walked into the streetcar, was merely an afterthought, and not in accordance with his prior statement. Moreover, the admission made by the operator was clearly consistent with the contention of the plaintiff that the pedestrian who was looking toward his right involuntarily turned toward his left as he saw or felt the streetcar bearing down upon him. And, most importantly, the operator did not deny that he had made the foregoing statement to the officer!

Any summary of the evidence by the Court which ignored this testimony of the police officer was neither complete nor a fair statement. This testimony was an essential and integral part of the case.

Yet, the Court, in its comments to the jury, chose to ignore this vital testimony. Not only did the Court make no mention whatever of this prior admission of the operator, but it referred to the statement made by the operator at the trial some 3 1/2 years after the accident, as if this were the only testimony in the record on this point. And when counsel for the plaintiff asked the Court to make

some reference to the testimony of the police officer, the Court best illustrated its attitude by not only refusing to do such, but by saying:

"Well, you argued that to the jury. I don't think I need say anything about it" (J.A. 51).

The Court thus took the position that it could state the defendant's case in detail, but that it would leave a rebuttal of that case to plaintiff's counsel. The Court showed that it felt it proper that the defendant's important testimony have the benefit of being stated by the Court, while plaintiff's important testimony might be left to review by plaintiff's counsel.

Now was this the only example of the Court's one-sided comments. In its prior opinion on this case, this Court referred to the testimony of the passenger Nolin and stated that it was for the jury to evaluate. Yet when the Court commented on Nolin's testimony it gave to the jury only the version beneficial to the defendant, thus evaluating it for the jury's benefit.

The Court referred to the document obtained by the D.C. Transit investigator from the witness and the sentence contained therein: "I did not see this man until after I heard the thump . . ." The Court totally ignored such witness' testimony, that he had seen the decedent from the time the streetcar had stopped for a light, 150 feet away, and that the decedent had not moved as the streetcar passed. The Court further chose to ignore the witness' explanation that he did not see the man for a fraction of a second as the wide part of the streetcar passed him (J.A. 40-51).

While the Court told the jury that it was for them to determine what weight to attach to Nolin's testimony, that was merely lip service to a legal principle. The Court left no doubt as to what weight it felt the jury should attach to the testimony.

As a result of the Court's comments, the jury was treated to judicial highlighting of the defendant's evidence with equal treatment denied to the plaintiff's evidence. The Court, in effect, gave the defendant's evidence its most respected judicial sanction, and the jury could not fail but be impressed with it. It was error for the Court so to prejudice plaintiff.

The law is quite settled in this regard. In Quercia v. United States, 289 U.S. 466, 53 S. Ct. 698, 699, 77 L. Ed. 1321, Chief Justice Hughes, speaking for the Court, stated:

"This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office . . . His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses. The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.' This Court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead, and especially that it should not be one-sided.' " (Emphasis added)

In Virginia R. Co. v. Armentrout, 166 F. 2d 400, 4 ALR 2d 1064 (CCA 4th) the Court held:

"It was proper, of course, for the judge to array the evidence and comment upon it; but what the law envisions in this regard is judicial comment fairly explaining to the jury the contentions of the parties with respect to the evidence, not argument by the court in support of contentions. The judge occupies a position of great influence with the jury in conducting a trial; and while he should not hesitate to exercise the power of comment to clear away false issues and lead the jury into a proper understanding of the facts, he should be careful not to assume the role of counsel or to say anything which might have

the effect of prejudicing the cause of either party before those whose duty it is to decide on the facts." (Emphasis added)

McLaughlin v. Penn. R. Co., 170 F. 2d 121 (CCA 3rd) is directly in point. The Circuit Court of Appeals cites Sperber v. Conn. Mutual Life Ins. Co., 140 F. 2d 2, 5 Cert. Den. 321 U.S. 798, 64 S. Ct. 939, 88 L. Ed. 1087:

"The problem here is not that of a judge's comment upon or stating an opinion about the evidence. The situation is that the Court in summarizing an important aspect of the evidence * * * outlined the evidence favoring appellees and, when requested to cover the same aspect where favorable to appellant, omitted to do so.

While a Federal Trial Court is not at all required to state his recollection of the evidence with nice exactitude for both sides, yet, if such summary is made, it must be fair to both sides to the extent that it is not so one-sided or so warped that it must be regarded as prejudicial to one side in its effect upon the jury."

The Court clearly prejudiced plaintiff by weighting its comments in favor of the defendant and thereby giving defendant's evidence dignity and "great weight" in the minds of the jurors. The Court refused to accord plaintiff the same consideration. The Court's attitude is clearly shown in its comment that counsel for plaintiff had covered a most essential feature of plaintiff's case in his own argument and thus it need not be referred to by the Court. The result was a one-sided, weighted comment in favor of the defendant.

II and III

THE COURT ERRED IN FAILING TO GRANT THE JURY'S REQUEST THAT THE TRANSCRIPT OF THE TESTIMONY OF WITNESS MASON BE READ TO THEM, AND SUBSEQUENTLY ERRED IN ANSWERING INCORRECTLY QUESTIONS PUT TO THE COURT BY THE JURY AS TO THE PRECISE POINT OF CONTACT ON THE STREETCAR

After the jury retired to deliberate they sent a note to the Court which stated:

"We would like to have the transcript of Officer Mason's testimony. If that is not possible, we would like to know where the dimension seven feet three inches was measured from. We would like to know where precisely the piece of one square inch straw was found."

The request was quite clear. There was only one basic demand, namely, to have the benefit of Officer Mason's testimony. If that were not possible - namely, in the alternative - then the jury asked for two pieces of information: (1) from where the dimension 7 feet 3 inches was measured; and (2) where precisely the piece of one square inch straw was found.

The Court first interpreted the question quite properly and said that it would read to the jury the transcript of the witness (J.A. 51-52). Then, without apparent reason, it changed its decision and took the position that three separate items were asked for in the note (J.A. 52), taking the erroneous position that the jury had only asked for portions of the transcript.

A

**The Court Should Have Had the Testimony
of Officer Mason Read to the Jury in
Accordance With Their Request**

It was error under these circumstances not to read to the jury the entire transcript of Officer Mason's testimony. The jury had made it quite clear that it wanted to have the transcript of Officer

Mason's testimony. The reporter was present in Court with his notes and same were readily available (J.A. 53). When counsel for the plaintiff asked that the request of the jury be granted and that the testimony be read to the jury in its entirety, the Court stated (J.A. 52):

"I am going to have read only so much of it as the jury asks for. I shall be guided by the jury's desire rather than by counsel's."

But the jury had already stated its desire. The jury had asked for the testimony to be read in its entirety!

When counsel for plaintiff remonstrated to the Court that the jury had asked for the witness' testimony and not for part of the testimony, the Court referred to the note, stating "' Well, if that is not possible', but this is possible" (J.A. 51), evidently referring to reading parts of the testimony.

Such statement shows that the Trial Court was confused. Such confusion is also apparent from the Court's colloquy with the jury. At J.A. 53 the Court told the jury that it would take up the "items one by one." Thus, the Court again took the erroneous position that separate demands had been made by the jury. The Court stated to the jury that it had a right to have the testimony re-read, but then, without waiting for any response from the jury, continued on: "But before we take that up, the second question is . . ." and "Then the next question is . . ." (J.A. 53-54).

At the conclusion, the Court did not refer to its first question, namely, if the jury wanted the entire transcript re-read (which it had already told the Court it did), but stated to the jury: "Now, does that answer those two questions?" (Underlining supplied)

The Foreman of the jury answered that it did not answer the questions and then colloquy proceeded which left the matter more confused and in grave doubt. Actually, a reading of the transcript would have answered all of the questions of the jury for the Officer had testified quite clearly that the 7 foot 3 inches distance was specifically at the point of the edge that extended out from the streetcar so that it was its widest point (J.A. 12-14).

B

**The Court Answered the Specific
Questions of the Jury Erroneously**

The testimony of Officer Mason was that he had found the piece of straw at a point 7 feet 3 inches from the front of the streetcar at a metal edge which was the widest part of the streetcar. The jury specifically asked the Court: "What precisely was the point of contact on the streetcar?" and counsel for the plaintiff referred to Officer Mason's testimony, stating that it was on the "protrusion, that ledge that stuck out, Your Honor, 2-3/4 inches if Your Honor remembers. That is in the stipulated measurements" (J.A. 56).

Then the Foreman specifically asked the question: "Could the point of impact have been the edge or was it on a flat side of the car?" (J.A. 56). When counsel for the defendant said that he did not recollect where the point was, the Court refused to give to the jury the testimony on this point and further refused to give to the jury the benefit of the Officer's testimony. The Court evidently took the position that it could only relate to the jury what the evidence was as long as counsel for the defendant did not dispute the recollection of counsel for the plaintiff, because, in answer to the direct question of where the point of impact was, the Court advised the jury:

"The testimony is Mr. Foreman that the point of impact was 7 feet 3 inches back of the front of the streetcar and 5 feet 8 inches from the ground. That is as far as the testimony is undisputed." (J.A. 57)

The jury had not been satisfied with the 7 feet 3 inch measurement and wanted to know exactly where that measurement was, and specifically, was it on the sharp edge or was it on the flat side of the streetcar. The Court refused to give to the jury the answer to this question, and the answer could easily have been obtained. The Court could have had Officer Mason's testimony read to the jury or it could have adopted the recollection of plaintiff's counsel as to the testimony, which recollection the record shows was accurate. Either alternative would have answered the jury's question. But, the Court did neither.

The significance of the jury's question could not be clearer. If the decedent had walked into the streetcar, as defendant alleged, then it would be consistent that he would have come into contact with the flat side of the car. If, as plaintiff contended, the decedent was standing between the safety zone and the track and the narrower front part of the streetcar missed him as it passed, it is consistent with this theory that the 2 1/2" metal protrusion, located at the widest part of the streetcar, struck him as there was insufficient clearance for the wider part of the streetcar to pass him while he remained, oblivious, in his position of danger.

Counsel for plaintiff proffered the correct testimony, but the Court refused to so inform the jury (J.A. 57).

The Court, in failing to give the jury the full, correct testimony, removed from the jury's consideration one of the most vital aspects of appellant's case, and thereby did great harm and prejudice to her.

In United States v. Hammond, 226 F. 849 (D.C. N.D. Calif.) (reversed on other grounds) 246 F. 40 (CCA 9th), the Court allowed the transcript of a witness to be read to the jury after it had retired until such time as the jury indicated that its memory with regard to that testimony had been refreshed.

In James v. Key System Transit Lines, 270 P. 2d 116 (Dist. Ct. of App. Calif.), that Court held that a request made by the jury after it had retired to rehear portions of a deposition of a witness who testified at trial was reasonably to be interpreted as a request for a reading of some portion of the transcript and the Court's refusal to comply with the jury's request in this respect constituted error.

See also Kleinhons v. American Gauge Co., 80 N.E. 2d 626 (Ct. of App. Ohio) where the Court held that it was not error for the Court to instruct the reporter to read to the jury the testimony of one of the witnesses when requested by the jury after it began its deliberations, and Shiers v. Cowgill, 59 N.W. 2d 407 (Sup. Ct. Neb.) where the Court held that not only was such reading proper, but (at p. 414) "The stenographic reporter's notes of the testimony are liable to be more accurate than the judge's recollection of what was testified to."

IV

THE COURT ERRED IN REFUSING TO ADMIT INTO EVIDENCE REGULATION 22 (c) TRAFFIC AND MOTOR REGULATIONS OF THE DISTRICT OF COLUMBIA

When the operator left the stop light, about 150 feet from the accident, his speed was about 10-12 miles per hour (J.A. 17). The operator then said that he slowed to 8 to 10 miles per hour as he approached the decedent "ringing the bells all the time" (J.A. 35). His purpose in ringing the bells was "to warn(the decedent), to attract his attention, to get him to look at me" (J.A. 37). Although the operator realized that he had not attracted the decedent's attention, he said that he picked up speed when he was abreast of the decedent (J.A. 38).

The witness Ostrum testified that the stopping distance indicated a speed of 16 1/2 miles per hour at the time of impact (Tr. Vol. I, p. 64). On the foundation of this testimony plaintiff offered Regulation 22(c) of the Traffic and Motor Vehicle Regulations of the District of Columbia in evidence (J.A. 38).

The applicable portion of Regulation 22 is as follows:

"ARTICLE VI. SPEED RESTRICTIONS
Sec. 22. Speed Restrictions

(a) No person shall drive a vehicle on a street or highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. In every event speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the street or highway in compliance with legal requirements and the duty of all persons to use due care.

* * * * *

(c) The driver of every vehicle shall, consistent with the requirements of (a), drive at an appropriate reduced speed when approaching and crossing an intersection or railway grade crossing, when approaching and going around a curve when approaching a hill crest, ~~when~~ traveling upon any narrow or winding roadway, and when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions."

The Court refused to admit the said Regulation into evidence.

The Court ruled, as a basis for omitting Section 22, that the operator had not said that "he increased his speed." The Court said:

"he (the operator) said that the streetcar gained speed, which is an entirely different thing; in other words he was not accelerating the streetcar. He used the words 'picked up speed'" (J.A. 39).

And later:

"he said it picked up speed." (Underlining supplied) (J.A. 39)

At J.A. 38, the following occurs:

"Q. Now, as you went forward as a matter of fact you picked up speed, didn't you?

"A. Well, when do you mean? I actually picked up speed twice during the course of the accident. I picked up speed when I first took off from the stop light, and also I picked up speed again when I was abreast of Mr. Wabisky."

This testimony, coupled with the expert Ostrum's testimony that the physical facts indicated a speed of 16 1/2 miles per hour, gave rise to a basis for consideration of whether in the light of the "actual and potential hazards then existing" the vehicle had been driven at a speed greater than reasonable and prudent, particularly in view of the "special hazard" existing with respect to the pedestrian.

It is difficult to understand why the Court refused to admit such Regulation. There was not even any factual question existing since the operator had testified that he saw the pedestrian 150 feet away, picked up speed when he first took off from such distance (at the stop light) and then picked up speed when he was abreast of the decedent. The jury should have had the benefit of Section 22(a) in view of the operator's own testimony. There was a question presented to the jury as to even whether 10 or 12 miles per hour was reasonable and prudent in view of the fact that the decedent obviously was unaware of the streetcar's coming and, further, as to whether the operator should have increased his speed until the streetcar had completely passed the decedent.

In D.C. Transit System, Inc. v. Slingland, 105 U.S. App. D.C. 264, 266, F. 2d 465, Cert. Den. 361, U.S. 819, 80 S. Ct. 62, a bus was forced to stop in a position so that its front was to the curb and its rear angled out into the street because of another truck parked in the bus zone. A third truck, in attempting to go around the bus, struck it and the impact threw a bus passenger onto the floor, injuring herself. The Transit Company alleged error in the admission of Traffic Regulation 76, which prohibits the parking or standing of vehicles otherwise than parallel with the edge of a roadway and headed in the direction of the lawful movement of traffic, with certain exceptions not here material.

The Court held: (page 267)

"Rule 76 is designed for the safety of the public and is not merely 'intended and phrased to promote the rapid and uninterrupted flow of traffic' as Transit

suggests. This being so, and the evidence affording a basis for the jury to conclude that the regulation was violated, its reception in evidence was not error; nor can we say the court was required to rule that its violation, if found by the jury, was immaterial."

D.C. Transit System, Inc. v. Homer F. Coffey, et al, _____

A. 2d _____, (D.C. App. 3208, decided May 17, 1963.)

This case involved a collision between a bus and a truck at an uncontrolled "T" intersection. The sole error charged on appeal is the refusal of the trial judge to consider the provisions of Sections 46(a) and 46(b) of the Traffic and Motor Vehicle Regulations of the District of Columbia in reaching a decision as to the responsibility of the collision. The question involved was the issue of right-of-way between the two vehicles.

The Court below specifically held that Sections 46(a) and 46(b) were not relevant since the bus was turning left rather than proceeding through the intersection without turning and such regulation deals with the entering of two vehicles into an intersection from different highways.

This Court held that:

"Testimony on the movements of two vehicles up to the point of collision was conflicting and the trial judge should have considered the evidence in the light of all pertinent traffic regulations. Failure to consider proffered Sections 46(a) and 46(b) in the present situation was prejudicial to the bus owner."

Whether or not the Regulation was violated was a question for the jury to determine. The Traffic Regulation was admissible and its exclusion was prejudicial to the plaintiff and error.

THE COURT ERRED IN REFUSING TO ALLOW
WITNESS NOLIN TO EXPLAIN A PORTION OF
HIS WRITTEN STATEMENT

The witness Nolin testified that he was a passenger on the streetcar and that he kept the decedent in view from the time the streetcar was 150 feet away at the stop light until the collision, except for that fraction of a second when the extended front part of the streetcar obscured his view. This witness testified that the decedent stood between the rail and the safety box, and did not move as the streetcar approached (J.A. 25, Tr. Vol. I, p. 31).

At the trial, defendant streetcar company produced a written questionnaire with answers thereto written by an investigator of the company, and signed by such witness. The questionnaire contained a statement that the witness did not "see the man until after I heard the thump." The witness testified that he had told the investigator that the decedent had not moved and that there came a time when he had lost the decedent from his view (J.A. 26, Tr. Vol. I, p. 47). These answers were not in the questionnaire.

On redirect examination, counsel for plaintiff asked the witness what he had meant by the statement in the questionnaire. The Court excluded such question. Plaintiff submits that such question was proper. There was certainly some ambiguity as to what the witness meant by the answer to the question, particularly in view of his statement as to what he had told the investigator and what the statement finally amounted to. The importance of this testimony is highlighted by the fact that the Court made much of this statement in its comments to the jury and, in effect, discredited a witness without affording such witness the opportunity to explain the apparent inconsistency. The evidence should have been admitted.

Parol evidence is admissible to explain the meaning of an ambiguous instrument or to explain terms of doubtful import.

Fox v. Johnson & Wimsatt, 75 U.S. App. D.C. 211, 127 F. 2d 729,
H. Herfurth, Jr. Inc. v. U.S., to Use of Squire, 66 App. D.C. 220,
85 F. 2d 719.

VI

APPELLANT RAISED AN ADDITIONAL POINT IN
HER STATEMENT OF POINTS TO BE RELIED
UPON ON APPEAL. APPELLANT HEREBY
ABANDONS POINT VI OF SUCH STATEMENT

CONCLUSION

Plaintiff respectfully states that she was denied a fair and impartial trial on the issues herein by reason of the errors set forth above. Plaintiff prays that the judgment of the District Court be reversed and the cause set down for a new trial.

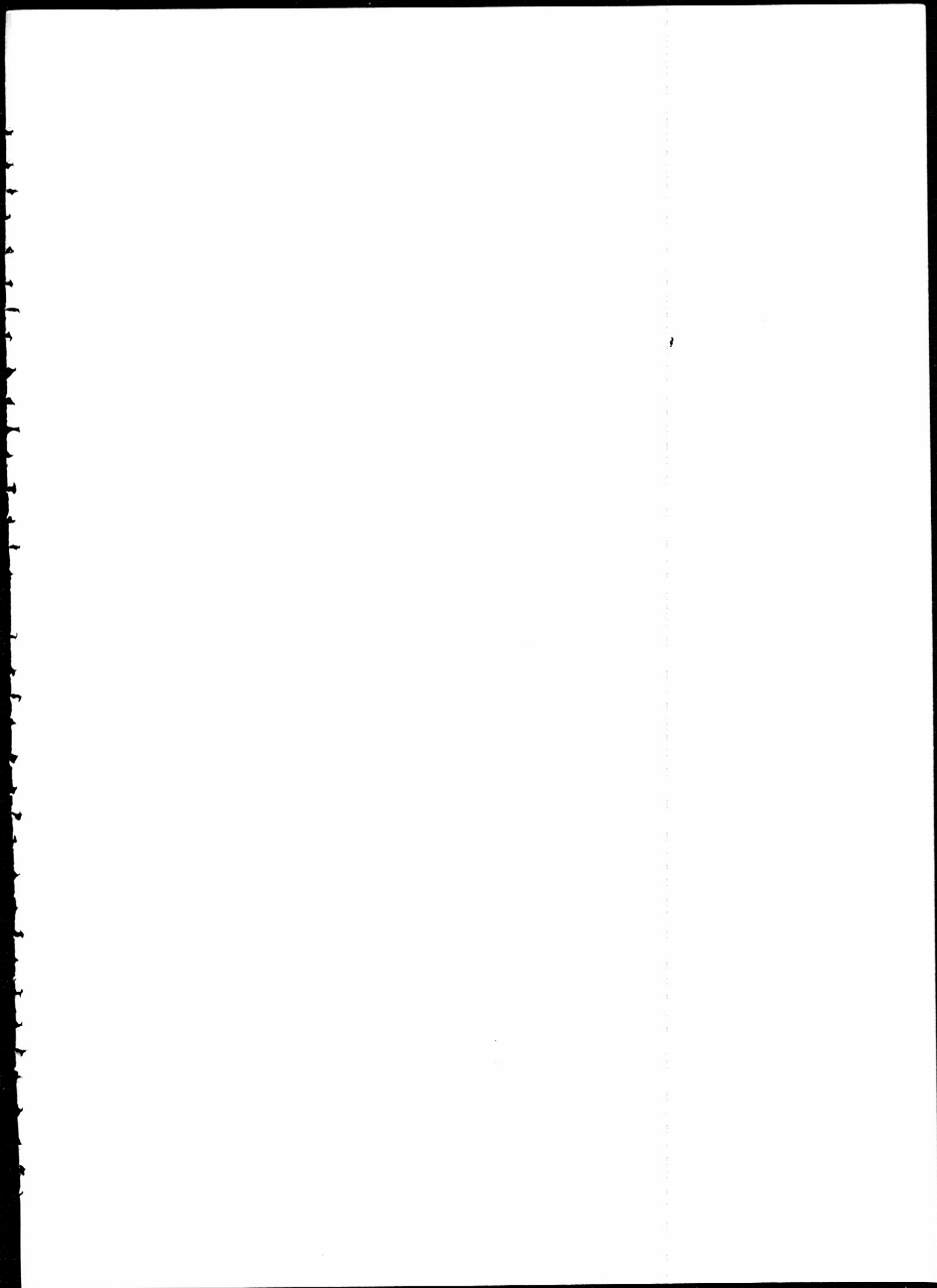
Respectfully submitted,

J.E. BINDEMAN

LEONARD W. BURKA

606 Landmark Building
Washington 5, D.C.

Attorneys for Appellant.



(i)

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Plaintiff

Civil Action
No. 3175-'59

Defendant

(Damages for Death by Wrongful Act
Pedestrian - Streetcar Accident)

4. At the time of the aforesaid collision, the said operator, Jimmy

Vance Lane, negligently and carelessly operated his said streetcar in that he negligently failed to maintain a proper lookout, negligently failed to keep his vehicle under reasonable and proper control, negligently operated his said vehicle at a fast and excessive rate of speed under the existing circumstances, negligently failed to yield the right-of-way to plaintiff's intestate, Joseph L. Wabisky, and negligently failed to slow down and/or stop when he saw, or by the exercise of ordinary care, should have seen, the said plaintiff's intestate in a position of peril of which he was apparently oblivious; all in violation of the duties of defendant.

5. That as a result of the aforesaid collision, said intestate, Joseph L. Wabisky, was thrown into the air, and forcibly precipitated to the street pavement, sustaining serious and painful injuries which required his hospitalization at the Eastern Dispensary and Casualty Hospital in the District of Columbia, and which injuries ultimately resulted in his death in the said Hospital at 12:30 p.m. that same day from hemorrhage, shock, and a depressed skull fracture. That the said decedent, Joseph L. Wabisky, at the time of his wrongful death caused by the negligence of the defendant's agent, servant and employee as aforesaid was forty (40) years of age, having been born on December 16, 1918.

6. That the injuries sustained by said decedent were such that if death had not occurred he would have been entitled to maintain an action to recover damages arising out of said collision, but no such action was or could have been instituted or recovery made in said decedent's lifetime because of his death.

7. That as a result of the death of the said Joseph L. Wabisky, deceased, a cause of action has accrued to the plaintiff as ancillary administratrix of said decedent's estate for the benefit of herself and decedent's child, namely, Elizabeth Ann Wabisky, a minor, born February 13, 1957, both of whom have sustained pecuniary damages as a result of the decedent's death, all in the sum of Two Hundred Fifty Thousand Dollars (\$250,000.00) as provided for by statute, Title 16-1201, D. C. Code of Laws, 1951 edition, as amended.

WHEREFORE, plaintiff brings this action and demands judgment against the defendant, D. C. Transit System, Inc., a corporation, in the full sum of Two Hundred Fifty Thousand Dollars (\$250,000.00) besides the taxable costs of this action.

/s/ J. E. Bindeman

/s/ Dexter N. Kohn

/s/ Leonard W. Burka
Attorneys for Plaintiff
436 Wyatt Building
Washington 5, D. C.
District 7-0630

JURY DEMAND

Plaintiff demands trial by jury of all the issues herein.

/s/ Dexter M. Kohn

[Filed December 7, 1959]

ANSWER TO COMPLAINT

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

1. Defendant admits that on June 26, 1959 plaintiff's decedent, Joseph L. Wabisky, left a position of safety and came into contact with one of its east bound streetcars at or near the intersection of Pennsylvania Avenue and 13th Street, N. W., in the District of Columbia. Defendant admits that its streetcar was being operated at the time of the accident by Jimmy Vance Lane, its agent, servant and employee.

2. Defendant is without knowledge or information which is sufficient to form a belief with respect to the truth of the allegations concerning the status and personal or family situation of plaintiff's decedent, the injuries which he may have sustained or the status of plaintiff Irene B. Wabisky and, therefore, demands strict proof thereof.

3. Defendant denies that any injuries or damages were sustained as the result of any negligence on its part and further denies each and every other material allegation contained in the complaint which is not herein specifically answered.

Third Defense

The injuries or damages which may have been sustained were the result of the sole or contributory negligence of the plaintiff's decedent, Joseph L. Wabisky.

HOGAN & HARTSON

By:

/s/ John P. Arness
Attorneys for Defendant
800 Colorado Building
Washington, D. C.

[Certificate of Service]

EXCERPTS FROM TRIAL PROCEEDINGS

1

Washington, D. C.
Tuesday,
January 8, 1963.

The above-captioned cause came on for further trial before
THE HONORABLE ALEXANDER HOLTZOFF, United States District
Judge, and a jury.

*

*

*

*

3

ROBERT L. MASON

called as a witness by Plaintiff, having been duly sworn, was examined
and testified as follows:

DIRECT EXAMINATION

BY MR. BINDEMAN:

Q. Mr. Mason, would you state your full name? A. Robert
L. Mason.

*

*

*

*

Q. And how long have you been engaged as a police officer? A. A little over 12 years.

THE COURT: I think you better bring out what department.

* * * *

THE COURT: What police department? There are six different police departments in the District of Columbia and maybe seven.

MR. BINDEMAN: Yes, of course.

Q. To which police department are you attached? A. I am with the Accident Investigation Unit, Metropolitan Police.

4 Q. And how long have you been attached to the Accident Investigation Unit of the Metropolitan Police Department? A. About four and a half years.

Q. On June 26, 1959, were you attached to the Accident Investigation Unit? A. Yes, I was.

Q. What are your duties with respect to your assignment to the Accident Investigation Unit?

THE COURT: I think we will take judicial notice of that.

MR. BINDEMAN: Very well, sir.

Q. How long had you been investigating accidents on June 26, 1959? A. I had been investigating accidents ever since I came on the Police Department.

Q. That would be for 12 years? A. Yes, sir.

* * * *

5 Q. Did there come a time, Officer, on June 26, 1959, that you received notification of an accident that had happened at 13-1/2 Street and Pennsylvania Avenue? A. Yes, I did.

Q. What time did you receive your call? A. I have to refer to my notes.

THE COURT: You may refer to your notes, Officer, if you wish.

A. We got the call 11:59 a.m.

Q. What time did you arrive at the scene? A. Approximately 12:05 p.m.

Q. When you got there were you wearing your uniform? A. Yes, sir.

Q. What did you find when you got to the scene of the accident?
A. When I arrived and got to the scene of the accident I learned that a pedestrian had been struck by a streetcar, and the operator of the streetcar told me that he hadn't moved the streetcar since the accident took place. The pedestrian had been taken away in an ambulance.

THE COURT: Go a little slower, Officer. A. The pedestrian had been removed from the scene prior to my arrival. There was some blood in the street to indicate to me that the pedestrian might be hurt seriously.

Q. Did the operator identify himself to you? A. Yes, he did.

Q. What was his name? A. His name was Jimmy Vance Lane.

Q. Is that L-a-n-e? A. That's right.

Q. How was Mr. Lane dressed? A. In the regular streetcar operator uniform, D. C. Transit.

Q. Was anyone else with him at the time that you arrived, wearing the uniform of the D. C. Transit Company? A. No. Later on an inspector from the company came on the scene.

Q. Pursuant to your assignment did you take any measurements?
A. Yes, we did.

Q. First, with reference to the blood spot, would you tell His Honor and the jury approximately how large would you describe the blood spot was? A. The blood spot in the street was the size of a dish, a regular table dish, maybe a little smaller.

Q. What was the condition of the blood? A. It was fresh and wet.

Q. Where was the blood located with respect to the east crosswalk?
A. Excuse me while I look at these notes.

THE COURT: You may consult your notes.

THE WITNESS: Thank you.

One and a half feet east of the east crosswalk line.

Q. One and a half feet, is that what you said? A. That's right, east of the east crosswalk line. Outside of the crosswalk, in other words. East, towards the Capitol.

Q. One and a half feet, is that what you said? A. That's right, east of the east crosswalk line. Outside of the crosswalk, in other words. East, towards the Capitol.

Q. One and a half feet east, is that what you are saying? A. Yes, sir.

THE COURT: One and a half feet east of the east crosswalk?

THE WITNESS: Of the east crosswalk line, yes, sir. That is where the head was marked, and the bleeding was from the head.

Q. Then would that be twelve and six -- is that 18 inches you are talking about? A. That's correct.

Q. Eighteen inches east of the east crosswalk? A. That's right.

THE COURT: I thought he said east line of the crosswalk, not east crosswalk.

8 THE WITNESS: That is correct, Your Honor, it's east of the east crosswalk mark, the line in the street.

MR. BINDEMAN: Now, Your Honor, in the file there are some pictures. May I have the pictures which are there, sir?

THE COURT: Yes, indeed. You mean photographs?

MR. BINDEMAN: Yes, sir, photographs.

MR. ROBERSON: I have no objection to these, Your Honor.

MR. BINDEMAN: I offer in evidence, if the Court please, two photographs, one showing the safety box and certain stanchions, and secondly showing a streetcar approaching the safety box and the stanchions.

THE COURT: Are you offering them in evidence?

MR. BINDEMAN: Yes, sir.

THE COURT: Let them be admitted.

THE DEPUTY CLERK: Plaintiff's Exhibit No. 3 and Plaintiff's Exhibit No. 4.

(Two photographs marked Plaintiff's Exhibit No. 3 and Plaintiff's Exhibit No. 4 in evidence.)

THE COURT: May I inquire, I presume the photograph showing the streetcar was taken at a later time?

MR. BINDEMAN: Yes, sir.

THE COURT: This is not necessarily the streetcar involved in the accident?

MR. BINDEMAN: That is correct.

THE COURT: This photograph is intended merely to illustrate the scene generally?

MR. BINDEMAN: Correct, sir.

MR. ROBERSON: Yes, sir.

THE COURT: You may pass these to the jury, if you wish.

MR. BINDEMAN: Yes, sir. Thank you.

(The exhibits were handed to the jury.)

THE COURT: You may proceed.

MR. BINDEMAN: Since I want to ask this witness about one of the pictures, may I wait until I have the picture, Your Honor?

THE COURT: Then suppose you withdraw the pictures from the jury.

MR. BINDEMAN: Well, as long as they have it, then I will proceed to something else, if I may.

THE COURT: Very well.

Q. With respect to the safety box, Officer Mason, would you tell us what type it was? Was it raised or was it merely painted lines on the street? A. It was painted lines on the street.

Q. Did you measure the safety box? A. No, sir, I didn't measure the width of the safety box.

Q. Did you examine the ground around the stanchion for any scuff marks? A. Yes, we did.

Q. Did you find such a scuff mark? A. Yes, sir, I did.

Q. How many marks did you find? A. I believe there was one clear scuff mark.

Q. And where was the scuff mark with respect to the west crosswalk line? A. The scuff mark was located 12 feet east of the west crosswalk line and six inches north of the north safety zone -- safety box line. Six inches out of the box, six inches north of this painted line in the street which is a safety box, and 12 feet east of the west crosswalk line. In other words, 12 feet east in the crosswalk.

Q. Now, did you measure the crosswalk? A. The crosswalk, yes, sir; 20 feet.

Q. So that if the mark was 12 feet east of the west crosswalk, where would it be with reference to the east crosswalk? A. Be eight feet from the east crosswalk.

Q. And you indicated it was six inches outside of the safety box, is that correct? A. Yes, sir.

Q. Six inches north? A. Yes, sir.

Q. Now, with reference to the scuff mark, you indicated that was eight feet west of the east crosswalk, is that right? A. That's correct.

11 Q. Now, how about the blood spot with reference to the east crosswalk, where was that with reference to the east crosswalk?

THE COURT: I'm sorry, I did not follow you. Did you say that it was eight feet west of the east crosswalk?

MR. BINDEMAN: That's right. That is the scuff mark.

THE COURT: Yes.

Q. And now the blood spot? A. The blood spot is one and a half feet east of the east crosswalk line. In other words --

THE COURT: We have had that before.

Q. But, Officer are you sure of that? Look at your notes again and see if that is correct. A. One and a half feet east of the east crosswalk line that the head was marked.

Q. Didn't you tell me at one time that it was --

MR. ROBERSON: Just a minute. I don't think he ought to impeach his own witness.

THE COURT: Finish your question.

Q. Didn't you tell me at one time that the blood spot was 14 feet east of the east crosswalk? A. Mr. Bindeman, I think what it is, I have 34 feet east of the east curb of 13-1/2 Street to this blood spot. Now, the crosswalk is 20 feet wide. Therefore, there is a difference of 14 feet.

12 Q. So that once again I ask you again, with reference to the east crosswalk, where was the blood spot? A. I still believe the blood spot was close to the east crosswalk line.

Q. Well, I know this is a confusing intersection, with curblane and crosswalk, but you told me that the --

MR. ROBERSON: May it please the Court, I don't think he should argue with his witness.

THE COURT: I think he has a right to finish his question, and then you have a right to object.

Q. You told me that the blood spot was 34 feet --

THE COURT: Well, you must not say what he told you. You may ask him whether he told you.

Q. Mr. Mason, did you not say that the blood spot was 34 feet east of the east curblane? A. That's correct.

Q. Now, if the crosswalk is 20 feet -- I will put it better. Did you not say that the crosswalk was 20 feet wide? A. That's correct.

13 Q. Then would that not put the blood spot 14 feet east of the east crosswalk line? A. Yes, it would in matter of feet; but to my mind, with these pictures I have here and the pictures of the accident, apparently the curblane and the crosswalk line must not be -- in other words, the crosswalk is set in from the curblane. In other words, the crosswalk line doesn't start right with the curblane. The blood spot shows on the pictures.

Q. On whose pictures? A. On my pictures.

Q. May I see them? A. Yes, sir (handing).

Q. Are these pictures which were taken by you, Officer Mason?
A. Yes, sir.

MR. BINDEMAN: May they be identified, Your Honor?

THE COURT: They may be marked for identification.

THE DEPUTY CLERK: Plaintiff's Exhibits 5, 6, 7 and 8 for identification.

(Photographs marked Plaintiff's Exhibits Nos. 5, 6, 7, 8 for identification.)

MR. ROBERSON: May we approach the bench, Your Honor?

(Bench conference not transcribed.)

(Plaintiff's Exhibits Nos. 5, 6, 7,
8 for identification were received
in evidence.)

THE COURT: Would you like to pass these photographs to the jury?

MR. BINDEMAN: Yes, sir.

THE COURT: But if you want to examine the witness concerning them, you better do it first.

14 MR. BINDEMAN: I now have the other ones that I will examine about.

THE COURT: Very well. You may pass them to the jury, if you wish.

(The exhibits were handed to the jury.)

THE COURT: You may proceed.

Q. Officer Mason, I show you a photograph which has been admitted in evidence as Plaintiff's No. 3. I call your attention to a safety box in the picture and a stanchion located on what to the eye appears to be on or near the white line. I ask you if you measured the distance between the south track of the streetcar and that stanchion?

A. Yes, I did.

Q. And what measurement did you get? A. Two feet and nine inches.

THE COURT: May I look at the exhibit?

(The exhibit was handed to the Court.)

THE COURT: There are two stanchions. Did you identify the particular stanchion?

MR. BINDEMAN: I said the stanchion on the line, Your Honor, yes, sir.

THE COURT: I see.

MR. ROBERSON: Your Honor, the plat --

THE COURT: Will you come forward? It is difficult to hear you from the other side of the courtroom.

MR. ROBERSON: The plat which we have stipulated into evidence is drawn to scale and it shows it's a greater distance, I believe three feet to the stanchion, and I don't think that we ought to confuse the jury by stipulating to a plat and then to have the officer come in and say that according to his measurements --

THE COURT: Has the plat been stipulated?

MR. BINDEMAN: We have offered the plat, Your Honor, which shows a distance there of three feet, but I was going to inquire of this witness from where to where he measured, because the three feet --

THE COURT: You don't want to contradict your own exhibits, do you?

MR. BINDEMAN: No, sir, but the exhibit may have included the line itself.

THE COURT: I see.

MR. BINDEMAN: And this witness may have --

THE COURT: Of course, it is only a question of three inches, anyway.

MR. BINDEMAN: Yes, sir.

Q. Would you tell us from what distance to what distance you measured when you got your two feet nine inches? A. Yes, sir; I took it from the south part of the south rail to the north part of this painted line, to the edge of this line, the north part, with a hand tape.

Q. Now, Officer Mason, one of the pictures now being examined by the jury shows Streetcar 1122. Is that the streetcar which was involved in the accident? A. Yes, sir, that is correct.

Q. Did you try to find the point of impact on the side of the streetcar? A. Yes, sir, I did.

Q. Did you examine the side of the streetcar? A. Yes, sir.

Q. Did you find anything unusual on the side of the streetcar?
A. Yes, sir, I located a small piece of straw which came from the victim's straw hat.

Q. Now, how big was this piece of straw? A. It was very small,

it was maybe a little less than maybe -- it was maybe a square inch.

Q. Did you ascertain whether or not the decedent was wearing a straw hat when he was hit by the streetcar? A. Yes, we did.

Q. Did you examine that hat? A. Yes, I did.

Q. Did you notice anything unusual on the hat? A. Well, the hat was cut in front, just like someone would take a knife and cut it.

17 Q. Did the piece of straw that you found on the streetcar correspond in any way with the hole that you found on that hat?

A. Yes, it did. It was the same material, and there was not much doubt in anybody's mind that the piece of straw did come out of the man's hat.

Q. Did you measure where on the streetcar you found that piece of hat? A. Yes, we did.

Q. Where was that? A. I measured it five feet and eight inches from the ground to the point on the streetcar where I found this piece of straw hat.

Q. Did you also measure where it was with respect to the front of the streetcar? A. Yes; it was seven foot and three inches back from the front of the streetcar.

Q. Now, if the decedent was five foot eleven inches tall and there was a laceration on his forehead, would that correspond with the measurement of five foot eight inches from the ground where you found the piece of hat? A. I would say so because it was on his forehead, not the top of his head, and I don't know what position the man was in, whether he was leaning down or hunched over or standing straight. So

18 that would very easily be --

THE COURT: I want to go back and get the exact figure. You said that the straw was found on a spot seven feet and how many inches back of the front of the car?

THE WITNESS: Seven feet and three inches.

Q. Mr. Mason, what particular part of the streetcar is at this seven foot three inch measurement from the front that you have just told us about? A. That is where the body starts, the body of the streetcar, just at the rear of the front doors.

Q. Does the body extend further out at that point? A. The streetcar tapers off from that point forward.

Q. When you say tapers off, with respect to the front and the part seven foot three inches, does the streetcar extend outward at that point, at the seven foot three inch part? A. More so than the front of the streetcar, yes.

Q. Do you know whether or not that is the widest part of the streetcar, at that point seven feet three inches? A. Yes, because that would be -- that is as wide as it gets.

Q. Is there any unusual metal piece or strip at that point seven foot three inches? A. No, sir; it's just a regular, what do you call it, edge, like the edge here (indicating).

Q. So there is an edge at that point, is that correct? A. That is correct.

Q. Did you take any measurement of the streetcar's location?
A. Yes, we did.

Q. With reference to the rear of the streetcar, where was it with reference to the east crosswalk line? A. The streetcar was eleven foot east of the east crosswalk line, and that is to the rear of the streetcar, eleven feet. In other words, the streetcar was eleven foot out of this crosswalk.

THE COURT: Was eleven feet east of the crosswalk?

THE WITNESS: Yes, sir.

Q. That is the rear, is that correct? A. Yes, sir.

Q. Now, with respect to the front of the streetcar, where was that, still with reference to the east crosswalk line? A. The front of the streetcar was 53 feet east of the east crosswalk line.

Q. Now, you testified that the scuff mark was eight foot west of the east crosswalk line and the front of the streetcar was 53 feet east of the east crosswalk line. How far would that put the front of the streetcar from the scuff mark?

MR. ROBERSON: May it please the Court, I think that is an unfair question.

THE COURT: Beg pardon?

20 MR. ROBERSON: I object to that on the ground there is no evidence in this case that the front of the streetcar hit the man, so it doesn't make any difference how far it was.

MR. BINDEMAN: Well, I am coming to that.

THE COURT: Well, I will allow the measurement. Its probative value is something to be determined by the jury later on.

MR. BINDEMAN: Yes, sir.

Q. Would you answer the question, Mr. Mason? A. Would you repeat the question?

THE COURT: Will you read the question?

(The last question was read by the Reporter.)

A. Well, from the scuff mark to the front of the streetcar I can tell you by saying -- let's see. The streetcar was 53 feet east of the east crosswalk line. The scuff mark was eight foot west of this line. So, I will deduct eight feet from 53 feet, and that would give me 45 feet from the front of the streetcar back to the scuff mark, 45 feet.

Q. Now, Officer, wouldn't it be eight feet plus 53 feet if the scuff mark was west of the east crosswalk line? A. It would be that measurement if you want to know how far the streetcar went after the -- I see what you mean. In other words, altogether, all told.

Q. That's right. A. From the scuff mark. You are correct.

21 I'm sorry. That would be 53 plus eight.

Q. Sixty-one feet? A. Yes, sir. I'm sorry.

Q. Now, the front of the streetcar is then 61 feet from the scuff mark, is that right? A. That's correct.

Q. Now, you testified that you found this piece of straw marking on the streetcar seven foot three inches back from the front. Would that indicate to you how far the streetcar traveled from the scuff mark? A. If you want to know -- do you mean the part of the streetcar that came in contact with the pedestrian?

Q. Yes, sir. A. Sixty-one feet to the front of the streetcar, and I would subtract seven foot three inches to where the man came in

contact with the streetcar. So, I could say the streetcar, the part of the streetcar that struck the pedestrian went a distance of 53 feet and nine inches. Let's see now.

Q. Fifty-three feet nine inches? A. That's the way I figure it.

Q. Mr. Mason, what was the condition of the weather on that date? A. The weather was clear, the sun was shining and it was very hot.

22 Q. And what was the condition of the streetcar track? A. They were dry.

Q. Now, you testified that you got to the scene of the accident at five minutes after 12, I believe, is that right? A. Yes, sir.

Q. When you got there did you have any conversation with the driver? A. Yes, sir, I did.

Q. Now, what did you do first? Did you have your conversation with the driver first or did you make your measurements first? A. Well, I talked to the driver first to ascertain what had taken place.

Q. And did the driver tell you how long before you came the accident had happened? A. Yes. I asked him about what time and the operator told me the accident happened at 11:50 a.m.

Q. So that you got there about 15 minutes after the accident, is that correct? A. Yes, sir.

Q. Now, when you talked to him did you notice anything unusual about his appearance? A. No, there was nothing unusual about his appearance.

Q. With respect to his being excited, or otherwise, would you tell us what that condition was? A. Well, the man was upset.

23 Q. And how about the term that I used, excited; would you indicate whether or not he was excited? A. Slightly.

Q. When you talked to the man was the inspector, who you said got there later, was he present? A. I don't believe the inspector was there at the time I questioned the operator. He was there later when we had some conversation, I think, with the operator later.

Q. Did the operator tell you where he was when he first saw the pedestrian?

THE COURT: It seems to me that it would be better if you asked him what did the operator say instead of leading the witness this way.

MR. BINDEMAN: All right, sir.

Q. In your conversation which you had with the driver, Mr. Mason, would you please tell us what did the driver tell you? A. Yes. The driver told me he was waiting for a red light at 13-1/2 and Pennsylvania Avenue and when the light changed green he started off at a normal rate of speed. He told me that he saw this pedestrian going towards this safety box prior to his starting off when the light changed green.

THE COURT: Don't go quite so fast, Officer.

THE WITNESS: All right, Your Honor.

Now, I asked the operator how fast was he going and he said that he took off at the normal rate of speed; he said about ten to twelve miles an hour.

THE COURT: Would you repeat again what he said about seeing the pedestrian?

THE WITNESS: Yes, Your Honor. He said he saw the pedestrian going towards the safety box while he was waiting for the red light, he noticed him. And then he said when the light changed green he proceeded at a normal rate of speed; he said approximately ten to twelve miles an hour. And, of course, he told me -- he also told me that as he approached the safety box he saw this pedestrian looking towards the Capitol, which would be looking away from him, so he sounded his bell four or five times to try to attract the man's attention. Then he said as he went by the safety box he looked out his side doors, as he generally does passing a safety zone or streetcar loading platform, he looked out the side door and he said he saw this man slightly turned, and then he heard this bump and then he stopped the streetcar.

I asked him how fast was he going when this accident took place and he said the same speed because he didn't know that the man was going to come in contact with the streetcar. Therefore, he applied his brakes after the accident.

Now, I asked this operator if the man stepped into the streetcar. He said he couldn't say the man stepped. He didn't see him step. All

25 he could say was he noticed the man turning his upper part and his head like that (indicating), back toward the direction in which he was coming. That was as he started by him and he looked out the side doors. Then, of course, he didn't see the accident himself. He looked back and then he heard the bump and it attracted his attention and he stopped.

Q. Now, Mr. Mason, you said that the operator told you that he range his bell several times to attract the pedestrian's attention. Did he tell you whether or not the man ever turned toward him? A. Yes, sir; he told me that he didn't get the man's attention. The man wasn't looking at him as he started by, and that is why he was watching him out the side door.

Q. You testified that --

THE COURT: Do not repeat his testimony.

Q. Did you ask the driver if the man had -- if the pedestrian had stopped before the streetcar came to the safety box?

THE COURT: Will you read the question, please?

(The last question was read by the Reporter.)

A. Yes, I did. He said that he observed this pedestrian and the pedestrian was standing and looking toward the Capitol.

26 Q. Did the driver indicate what part of the streetcar had hit the pedestrian? A. The driver said it was the side of the streetcar. Of course, he pointed out the general area of the streetcar where he thought the pedestrian came in contact with the streetcar. He pointed out the general area.

Q. Did he tell you whether or not the streetcar was in full emergency when it stopped? A. Yes, we went into that, about the stopping of the streetcar. I was told when they throw in this emergency the streetcar sometimes dumps sand on the tracks to help stop it.

Q. Did you take the names of any witnesses to the accident, Officer? A. Yes, I did.

Q. What names do you have?

THE COURT: I don't think you need ask him that. You can call your witnesses.

MR. BINDEMAN: Well, I want to establish that they were there, Your Honor.

THE COURT: I don't think that is necessary, unless there is going to be a contradiction as to whether they were there or not.

MR. BINDEMAN: I have to turn to my adversary about that. If Your Honor deems --

THE COURT: Very well, then you can call the Officer in rebuttal.

27

MR. BINDEMAN: I have no further questions of this witness, Your Honor.

THE COURT: Any cross-examination?

MR. ROBERSON: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. ROBERSON:

Q. Officer Mason, the operator told you that the man that he saw standing was standing inside the safety box, didn't he, within the safety box? A. Yes, I believe he did.

MR. ROBERSON: Your Honor, I also am interested in the names of the witnesses the Officer got.

THE COURT: Very well, if both of you want the names of the witnesses you may ask that.

Q. Did you get the names of two people that were at the scene of the accident? A. Yes, sir.

Q. And what were their names? A. One was a Margaret Stearns, S-t-e-a-r-n-s, of 47 -- it looks like 4740 Connecticut Avenue, Apartment 502; and the other was a Lucien, L-u-c-i-e-n, Nolin, of 5301 R Street, Southeast.

Q. Did you talk to these witnesses? A. Yes, sir, I did.

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Q. Mr. Mason, we won't go into it right now, but you do remember what Mrs. Stearns and Mr. Nolin told you that they saw with respect to the accident, don't you? A. Truthfully, I can't remember what they said. I believe that they didn't --

MR. BINDEMAN: Just a minute. If he is going to go into what they said, I object, Your Honor.

THE COURT: Just answer yes or no. Do you remember what they said?

THE WITNESS: No, sir.

THE COURT: Can you refresh your recollection by consulting your notes as to what they said to you?

THE WITNESS: No, sir.

Q. You testified at the Coroner's inquest which was held just shortly after this accident, didn't you? A. That is correct.

Q. And at that time the matter was fresh in your mind?

29

A. That's correct.

Q. Do you believe that by referring to the Coroner's inquest you can recall what, if anything, these people told you they knew about the accident? A. I am sure at that Coroner's inquest, if that was written down, that must be -- just like this man is taking my testimony here -- it must be word for word.

Q. Yes, sir.

* * * *

LUCIEN NOLIN

called as a witness by the Plaintiff, having been duly sworn, was examined and testified as follows:

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CROSS-EXAMINATION

BY MR. ROBERSON.

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Q. You remember an investigator from the Transit Company named Mr. Hobbs coming out to your place of work at the Area Construction Company the very afternoon of the accident, about five o'clock, don't you? A. Yes, I believe it was five o'clock.

THE COURT: Try to speak a little louder so that every one can hear you.

THE WITNESS: Yes.

Q. And Mr. Hobbs, the investigator for the Transit Company, talked to you about the accident and asked you how it happened, didn't he? A. Yes.

Q. And he told you that he was going to fill out a questionnaire and give it to you to read and sign, didn't he? A. That's right.

Q. And after talking to you he did fill out a questionnaire and you read it over and you signed it, didn't you? A. Yes, I signed it.

Q. And you read it over before you signed it, didn't you? A. Yes.

40 Q. And you wrote in your own handwriting on there, "I have read both sides of this paper and it is correct," and gave your name and the date, 26 June 1959, didn't you? A. That is right.

MR. ROBERSON: Mark the paper Defendant's Exhibit 1 for identification.

THE DEPUTY CLERK: Defendant's Exhibit 1 for identification.

(Statement of Lucien Nolin marked Defendant's Exhibit No. 1 for identification.)

Q. Mr. Nolin, I have shown you and you have before you a paper marked Defendant's Exhibit 1 for identification. Would you look at that and identify what it is, Mr. Nolin? A. Yes.

Q. What is it? A. Well, this paper is for the date of the accident, location, nature --

Q. Well, don't read the paper out loud. That is the paper that you read over and signed on the date of the accident, isn't it? A. Yes, that's right.

Q. Now look at the second page of that paper. Down at the bottom in handwriting is, "I have read both sides of this paper - It is correct." Is that in your handwriting, down at the bottom? A. Yes, it is.

41 Q. And underneath that, in your own handwriting, is your own signature, Lucien Nolin? A. That's right.

Q. And that date there, June 26, 1959, is in your own handwriting?

A. That's right.

Q. Now, Mr. Nolin, didn't you tell Mr. Hobbs at five o'clock in the afternoon the very day of this accident that you did not see this man until after you heard the thump and looked out and saw him flying through the air? A. I have a habit of looking ahead when I drive -- when I ride --

THE COURT: No; read the question to the witness.

(The last question was read by the Reporter.)

Q. Didn't you tell that to Mr. Hobbs? A. Yes.

Q. And that appears right there in the last sentence, right above what you wrote in your own handwriting, doesn't it? A. That's right.

Q. Does that refresh your recollection, Mr. Nolin, that the truth of the matter is that you did not see this pedestrian until after he had come into contact with the streetcar, your attention having been attracted by a thump, and then you saw him flying through the air? Does that refresh your recollection that that is what you know about the accident? A. That's what I had told him, yes.

Q. Well, then, that is true, isn't it? A. As I said, I always look ahead, and I have seen people on the -- it could have been half a dozen people, but he must have been the one because he got hit.

Q. My point is, after reading that statement there -- A. Yes.

Q. Read it to yourself, Mr. Nolin, read the whole statement. Not out loud, but to yourself.

(Pause.)

A. Yes, that's it.

Q. And that was accurate at the time you told Mr. Hobbs?

A. Yes.

Q. And it's still accurate, isn't it, Mr. Nolin? A. Yes.

Q. As a matter of fact, when you talked to the police at the scene of the accident you also told Officer Nolin that what you saw was the man flying away after he had been hit, isn't that correct, when you

gave him your name? A. Yes, I did give the officer.

MR. ROBERSON: No further questions, Your Honor.

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REDIRECT EXAMINATION

BY MR. BINDEMAN:

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MR. ROBERSON:

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Your Honor, I offer in evidence Defendant's Exhibit 1 for identification as Defendant's Exhibit 1 into evidence.

THE COURT: Let it be admitted.

(Defendant's Exhibit 1 for
identification was received in
evidence)

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BY MR. BINDEMAN:

Q. Mr. Nolin, this exhibit just introduced in evidence was obtained, according to it, on June 26, 1959, the date the accident happened, is that not right? A. That's right.

Q. And it's been identified to you that a man named Hobbs came to see you, is that correct? A. He did.

Q. Now, before this trial that is taking place today did Mr. Hobbs come back to talk to you? A. Yes, about a week ago.

Q. And when he came back to talk to you about a week ago what did he want? A. He want me to sign my name on the same piece of paper, I suppose.

Q. Did he ask you to sign your name on this piece of paper? A. Yes -- well, I don't know if it was that piece of paper, but he asked me to sign my name.

Q. But he had another piece of paper, did he?

MR. ROBERSON: Your Honor, I think this is hearsay.

THE COURT: I do not see the relevance of this. Suppose you come to the bench, gentlemen. This may be important and I will let you make a statement at the bench.

(Bench conference not transcribed.)

BY MR. BINDEMAN:

Q. Mr. Nolin, I call your attention to the last statement on this Defendant's Exhibit No. 1 that says, "I did not see the man until after I heard the thump." What did you mean by that?

MR. ROBERSON: That is only half the last statement, Your Honor. He is not reading the whole sentence.

MR. BINDEMAN: I didn't think the rest was material.

THE COURT: I think you better read the whole sentence.

MR. BINDEMAN: I will be glad to.

THE COURT: I think you can't wrench out one-half a sentence out of its context.

Q. Mr. Nolin, the last sentence on Defendant's Exhibit No. 1 is as follows: "I did not see this man until after I heard the thump and looked out and saw him flying through the air." My question, sir, is: what did you mean by that?

(Pause.)

THE COURT: Well, does it require --

MR. ROBERSON: I think it speaks for itself.

THE COURT: There is nothing ambiguous about that. It means what it says, doesn't it?

MR. BINDEMAN: Well, it's ambiguous in the sense that it's differing from what his direct examination was, Your Honor.

51 THE COURT: Well, that does not make this ambiguous. It is just the opposite of what he said from the witness stand.

MR. BINDEMAN: Well, I do not want to argue the point, but there may be some room there, Your Honor, for --

THE COURT: I think you better ask another question or reframe your question, because there is no ambiguity here.

Q. Mr. Nolin, did you see the man before you heard the thump?

A. I have seen, I would say, about five or six people on the safety island and --

MR. ROBERSON: I object to that as not responsive.

THE COURT: You will have to answer the question that is asked you.

Read the question, Mr. Reporter.

(The last question was read by the Reporter.)

THE WITNESS: I have seen someone on the track, but the man, I wouldn't be sure.

Q. Well, the man whom you saw flying through the air, do you know if that was the same man who you saw before the thump?

A. This man that got hit, that got killed, had a shirt on, no coat. That's how I could recollect that he was close to the track and the safety island.

MR. ROBERSON: Your Honor, I move that that go out as not responsive to the question.

THE COURT: I am going to grant the motion to strike the answer.

52

Q. Mr. Nolin, when you were back from the safety island and you saw these people standing there did you see any person wearing a white shirt? A. There was one person with a white shirt, and after the accident that was the man that must have been there because he had just a shirt on.

Q. Was he the only person in this area who was wearing only a white shirt? A. I am quite sure of it, yes.

Q. Now, this man who you say was wearing a white shirt, is he the man who you told us was standing between the safety island and the south streetcar track? A. He was one of the men standing there, yes.

Q. And was this the man who you saw before the thump? A. Yes, I believe it.

Q. And was this the same man whom you looked out and saw flying through the air? A. As I got out of the streetcar I could see that was the same man.

Q. Now, when you said you did not see the man, you are talking about the time that the front of the streetcar passed him so that you were blinded?

MR. ROBERSON: I object to leading the witness, Your Honor.

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THE COURT: Objection sustained.

A. There was a very --

THE COURT: Just a moment.

MR. BINDEMAN: Just a minute.

THE COURT: Objection sustained.

Q. When you were watching the man did there come any time when you could not see him? A. In the front of the streetcar there is a section of about twenty inches, kind of a round shape, like, that the man kind of disappeared for a few seconds, and then I saw him hit the door.

MR. BINDEMAN: I have no further questions.

RECROSS-EXAMINATION

BY MR. ROBERSON:

Q. Mr. Nolin, on cross-examination you said that the statement contained in Defendant's Exhibit 1 was accurate that "I did not see this man until after I heard the thump and looked out and saw him flying through the air." And right underneath that you wrote, "I have read both sides of this paper - It is correct. Lucien Nolin, June 26, 1959." Are you now changing your testimony to say that that is inaccurate?

A. No.

Q. It's still accurate, is it? A. The reason is --

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Q. Is it still accurate?

MR. BINDEMAN: I submit he should be entitled to finish.

THE COURT: Objection overruled. This is proper cross-examination. Do not interrupt the cross-examination.

MR. BINDEMAN: I merely --

THE COURT: Do not interrupt the cross-examination.

A. The --

THE COURT: Read the question.

(The last question was read by the Reporter.)

A. I would say yes.

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Wednesday, January 9, 1963

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Thereupon,

FLOREINNE G. WALKER

was called as a witness for the defendant and, being first duly sworn,
was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ROBERSON:

Q. Would you state your full name, please, Mrs. Walker?

A. My name is Floreinne G. Walker.

Q. What is your residence address, Mrs. Walker? A. 1316
Harvard Street, Northwest.

Q. Where are you employed? A. Department of Defense.

Q. In what section? A. Support Services.

Q. Mrs. Walker, were you a witness to an accident between a
streetcar and a pedestrian that occurred on Pennsylvania Avenue near
13-1/2 Street, Northwest, on June 26, 1959? A. I was.Q. Where were you at the time of the accident? A. I was on
the streetcar.

Q. Do you remember where you had caught that streetcar?

A. At 14th and G Streets, Northwest.

Q. Did you obtain a seat on the streetcar, Mrs. Walker?

A. Yes, I did.

Q. Can you tell the Court and jury where you sat, approximately?

A. I sat about three seats from the front, the third seat from the front
of the streetcar.

Q. On which side of the streetcar? A. On the right-hand side.

Q. Was it the opposite side from the motorman? A. Yes.

Q. Now, can you tell us where the streetcar last stopped before
the accident occurred? A. Well, the streetcar stopped at 13-1/2
Street.Q. Was there a traffic light facing the streetcar at that
intersection? A. Yes, there was a traffic light.

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Q. What was the color for the streetcar of that traffic light when the streetcar moved forward to continue along Pennsylvania Avenue? A. Green.

Q. Can you tell us what the speed of the streetcar was approximately as it crossed the intersection of 13-1/2 Street?

A. Well, he was going slowly.

8 Q. As that streetcar was crossing the intersection of 13-1/2 Street, did you see the pedestrian that later was injured in the accident?

A. Yes.

Q. Where was the pedestrian when you first saw him? A. Standing in the safety zone.

THE COURT: Standing where?

THE WITNESS: In the safety zone.

BY MR. ROBERSON:

Q. What is the safety zone at that intersection? A. Well, I don't know, just a small place marked where you stand and keep from getting hurt.

Q. Was it a platform? A. No, it wasn't a platform.

Q. Was it a painted line? A. Yes, a painted line.

Q. What shape was it? A. Oh, I don't remember the shape.

Q. Was it a circle or oblong? A. It seemed like it was oblong. That is the way it seemed to me. I don't know.

Q. And can you tell us approximately where this man was standing within this oblong safety zone? A. He was just standing in the safety zone.

9 Q. Do you know whether or not the streetcar bell was sounded as the car crossed 13-1/2 Street? A. Yes, it was ringing rapidly.

Q. Where was the streetcar when you first noticed this man standing in the safety zone? A. Well, it was going down Pennsylvania Avenue.

Q. Well, had it started across the intersection by then?
A. Yes.

Q. What, if anything, did you see this pedestrian do and when did you see him do it? A. Well, as the car passed it seemed that he was looking straight ahead, and he walked right into the side of the car.

Q. Can you tell us approximately where the man came into contact with the side of the car? A. No, I don't know. I know the car had passed him at the time.

Q. Well, did the point of contact -- where did it come with respect to where you sat in about the third seat on the right-hand side of the streetcar? A. The car had passed him somewhat. It seemed about the middle way of the car when I heard the impact and saw him fall.

10 Q. Was the point of impact ahead of you or behind you or do you remember? A. I don't remember.

Q. Did you cry out when you saw this happen? A. It seemed I did. I said, "Oh, the man walked into the streetcar."

Q. Did you actually see him do this? A. Yes, I did.

Q. Were you looking forward? A. Yes, I was looking forward.

Q. Well, I ask you again, did the accident happen in front of you or behind you? A. It must have happened in front, because I saw him.

MR. ROBERSON: That is all. Thank you, Mrs. Walker.

* * * *

26 MR. ROBERSON: Your Honor, Mr. Bindeman, in order to save Officer Mason a trip back, has been kind enough to stipulate that if he were recalled he would testify that his recollection is refreshed by his testimony at the coroner's inquest held on June 29, 1959, and that his refreshed recollection would be as follows, which appears at pages 12 and 13 of the coroner's inquest:

"Question. Did you talk to any other witnesses?

"Answer. Yes, sir. I talked to two other witnesses. I talked to a, they were both seated on the right side of the streetcar.

"By the coroner: Question. Well, who did you talk to, Officer?

"Answer. To a Margaret Stearns and Richard Nolan. All they told me was that they saw the man as he went back. They were seated
27 back, one of them was seated two seats back from the rear door, rear of the front door. The other was seated four seats back."

* * * *

January 9, 1963

Thereupon,

JIMMIE VANCE LANE

was called as a witness by the defendant and, being first duly sworn,
was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ROBERSON:

Q. Will you state your full name, Mr. Lane? A. Jimmie Vance Lane.

Q. What is your residence address? A. 293 Rolinson's Avenue, Rockville, Maryland.

Q. Where are you employed, Mr. Lane? A. D. C. Transit.

Q. What is your job with the transit system? A. Bus operator.

Q. Have you ever operated streetcars for the Transit Company?
A. Yes, I have.

Q. Mr. Lane, were you the operator of a streetcar that was involved in a fatal accident with a Mr. Wabisky on June the 26th, 1959, near the intersection of 13½ Street and Pennsylvania Avenue, Northwest? A. Yes sir.

Q. Mr. Lane, about what time of day did the accident happen?

78 A. About 11:51.

Q. And what route was the streetcar on that you were operating?

A. It was on the 54 Route.

Q. Where does that run from and what is its destination?

A. It runs from 14th and Colorado, Northwest, to 8th and M, Southeast.

Q. Is that the Navy Yard? A. That is the Navy Yard.

Q. Where does it get on to Pennsylvania Avenue? A. At 14th and Pennsylvania Avenue.

Q. Northwest? A. Northwest.

Q. And then which direction does it go on Pennsylvania Avenue, Northwest? A. It goes east.

Q. What is the first intersection that you come to as you go east-bound on Pennsylvania Avenue on that route? A. 13½ and Pennsylvania

Avenue and E Street.

Q. Are you familiar with the traffic light situation at that intersection, 13½ and Pennsylvania Avenue, Mr. Lane? A. Yes, I am.

79 Q. Are you familiar with what it was in June of 1959? A. Yes sir.

Q. For a pedestrian that wanted to walk north across Pennsylvania Avenue on the east side of that intersection, what would be the traffic signal or signals that would face him as he went northbound across Pennsylvania Avenue over toward the National Theatre? A. Well, what do you mean?

Q. Where are the signals? A. Where are the signals?

Q. Yes. Not what they would read, but where are they located?

A. In the middle of the intersection.

Q. Is there another one on the north side? A. Yes, there is.

Q. What type of signal is it with respect to pedestrian traffic, is it in writing or merely lights? A. It is in writing.

Q. And what does the writing say on each of these two signals?

A. Don't walk.

Q. And then sometimes it says walk? A. And sometimes it says walk, yes.

80 Q. Mr. Lane, is the walk sign on long enough for a pedestrian to walk across the entire width of Pennsylvania Avenue without stopping at the first of the traffic signals? Do you understand my question?

A. You are asking if it is long enough?

Q. Yes. A. Yes, it is long enough.

THE COURT: Get closer to the microphone. It is a little difficult to hear you.

BY MR. ROBERSON:

Q. Is there a safety zone to the south of the streetcar tracks on the east side of that intersection at 13½ Street? A. Yes, there is.

Q. Is it a raised platform or is it painted on the street? A. It is painted on the street.

Q. Where is the traffic signal, the southernmost traffic signal with respect to that safety zone? A. It is inside the safety zone.

Q. I show you a photograph marked Plaintiff's Exhibit No. 6 and ask you if you can point out to me the first of the traffic signals that a northbound pedestrian would come to? A. I am facing north?

81 Q. Yes. (The witness so indicated.)

Q. Now, can you point on this photograph to the traffic signal controlling pedestrians on the far side of Pennsylvania Avenue? (The witness so indicated.)

Q. Mr. Lane, when the traffic control signal turns green for a streetcar or automobile traffic going east on Pennsylvania Avenue at 13½ Street, what happens to the walk and don't walk signals for northbound pedestrians that we have indicated on this photograph? A. They are on don't walk.

Q. Now, before this accident happened, where was the last stop you made prior to being involved in the accident? A. At the far side of the intersection, west.

Q. And why did you stop there? A. I stopped for the red light.

Q. There is no loading platform or anything there? A. No, there isn't.

Q. What color was the traffic light facing vehicular traffic that wanted to go eastbound when you started your streetcar forward? A. It was green.

82 Q. What color was that traffic signal when the actual accident took place? A. It was red.

Q. How do you know that? A. Well, I know that because it also releases to traffic in the eastbound lane, the automobile traffic. So it would have had to have been don't walk.

Q. I am not talking about the signal for the pedestrians. I am talking about the signal for the streetcars or any vehicular traffic that was going eastbound. When you started out it was green for vehicular traffic, is that correct? A. Yes, it was.

Q. When the accident occurred, what color was it with respect to vehicular traffic eastbound? A. You mean, the one controlling vehicular traffic?

Q. Yes. A. It was green.

Q. And what would that mean with respect to northbound pedestrians that were walking across Pennsylvania Avenue or had wanted to walk across, north across Pennsylvania Avenue? What would they have been during that period when it was green for the streetcar? A. They would have been on the don't walk.

Q. Mr. Lane, did you see the man with which your streetcar later
83 on had the accident before the accident occurred? A. Yes, I did.

Q. Where was Mr. Wabisky at the time you first saw him? A. I would say somewhere about the middle of the eastbound lane.

Q. Was he standing still or was he in motion? A. He was walking.

Q. In which direction was he walking? A. Northward.

Q. Did you continue to watch him? A. Yes, I did.

Q. What did you see him do? Did he continue to walk? A. Well, he continued to walk until after I started off.

Q. When, if ever, did you see him stop walking? Did you see him stop walking? A. Yes, I did.

Q. Where did he stop walking? A. In the safety square.

Q. I show you a photograph marked Plaintiff's Exhibit 3 and ask, do you recognize that scene, Mr. Lane, as showing the safety square?

84 A. Yes, sir.

Q. Would you put an X mark with the fountainpen at approximately where the man stopped within the safety zone? (The witness so indicated.)

(Plaintiff's Exhibit No. 3 was exhibited to the jury by Mr. Roberson.)

BY MR. ROBERSON:

Q. Mr. Lane, had the man remained in the spot that you have marked with a cross, would the accident have ever happened? A. No.

MR. BINDEMAN: Objection.

THE COURT: Objection sustained.

BY MR. ROBERSON:

Q. Was the distance between where the man was standing and the streetcar rail such that the streetcar could have struck him without him

moving from the safety zone?

MR. BINDEMAN: Objection.

THE COURT: I will overrule the objection. Perhaps you might reframe the question. You might ask the witness whether there was sufficient space between the spot where he was standing and the streetcar so the streetcar could have passed without striking him. It is the same thing, Mr. Bindeman.

85

BY MR. ROBERSON:

Q. Mr. Lane, was there sufficient clearance between the side of the streetcar at its widest point and the place the man was standing for the streetcar to have passed him without coming into contact with him provided he stayed in the same place? A. Yes, there was.

Q. Did you sound your gong as you crossed 13-1/2 Street?

A. Yes.

Q. Will you tell the Court and jury what, if anything, you observed the man do with respect to moving after you first saw him stop within the safety zone to the south of the car track? A. Well, you mean by the time that I was abreast of him?

Q. What motions did you see him make after he stopped in the safety zone? Tell us in your own words. Did you continue to see him?

A. Yes, I did.

Q. What movements did he make and where were you when you saw him make them, if he made any movements? A. Well, he didn't make any movement. He stopped looking sort of eastward on Pennsylvania Avenue.

86

Q. Is it unusual for people in your experience in seeing members of the public in safety zones or on curbs look away from oncoming streetcars?

MR. BINDEMAN: I object if the Court please.

THE COURT: I think I will have to sustain the objection.

BY MR. ROBERSON:

Q. Did you attach any significance to the fact that the man had his head pointed over toward the Capitol? A. No, sir, I didn't.

Q. What did you do after seeing the man standing in the safety zone with his head turned generally toward the Capitol? What did you do with respect to your streetcar? A. I slowed the streetcar down.

Q. Did you do anything else? A. I rang the gong.

Q. Well, approximately what speed did you slow your streetcar down to? A. Oh, eight to ten miles per hour.

Q. Did you continue to ring your gong or did you quit ringing your gong? A. No, I continued to ring my gong.

Q. Is that habitual with you in passing a safety zone or loading platform?

87 MR. BINDEMAN: I object, if the Court please.

THE COURT: Objection overruled.

THE WITNESS: Yes, it is.

BY MR. ROBERSON:

Q. And you remember doing so in this particular instance, do you? A. Yes sir.

Q. What, if anything, did you see the pedestrian do as the front of the streetcar got abreast of him? A. Well, he seemed to turn and step forward toward the streetcar.

Q. Did you see this motion through the front windshield of the streetcar or through some other parts of the streetcar? A. I saw it through the front doors.

Q. And where are they located with respect to where you were sitting, the front doors? A. Well, they would be right off to my right hand.

Q. Are they on the front or on the side of the streetcar is what I meant? A. They are on the side of the streetcar.

Q. And then you saw him through the front side doors, is that correct? A. That is right.

Q. What part of the streetcar did the man come into contact with,
88 approximately? A. I think it was approximately back by the number two window.

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A. Yes, I did.

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Q. And then you saw him through the front side doors, is that correct? A. That is right.

Q. What part of the streetcar did the man come into contact with,
88 approximately? A. I think it was approximately back by the number two window.

Q. How do you number windows on a streetcar? A. Well, starting from the front, there are two windows back is how I would number them.

Q. Did you actually see him when he came into contact with the car or did you hear something? A. No, I heard a thump and looked back.

Q. And when you looked back, what did you see? A. I saw him fly back off the side of the streetcar.

Q. What did you do with respect to the motion of your streetcar, the forward motion of your streetcar when you heard this thump? A. Well, I went back to the brakes and stopped the streetcar.

Q. What was the approximate speed of your streetcar at the time you heard the thump, Mr. Lane? A. Oh, I don't have any idea. I was picking up speed.

THE COURT: This might be a logical time to suspend for our luncheon recess.

MR. ROBERSON: Very well.

89 (The Court recessed at 12:28 p. m., and reconvened at 2:15 p. m.)

BY MR. ROBERSON:

Q. Mr. Lane, as you approached in your streetcar the area of the safety zone, did you see any pedestrian other than Mr. Wabisky standing within the safety zone? A. No, I didn't.

THE COURT: Speak a little louder, Mr. Lane. Please bear in mind that there are a lot of people that have to hear what you are saying.

THE WITNESS: No, I didn't see anyone else.

BY MR. ROBERSON:

Q. Was there anyone standing in between the north side, north line of the safety zone and the streetcar track? A. No, sir.

Q. Mr. Lane, as you started by this safety zone, did you see anything in connection with Mr. Wabisky that led you to believe he was going to leave the safety zone and go against the don't walk sign into the side of your streetcar?

MR. BINDEMAN: Objection, Your Honor.

THE COURT: Objection overruled.

THE WITNESS: No, sir, I didn't.

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91

CROSS EXAMINATION

BY MR. BINDEMAN:

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Q. Now, what did you do as you approached the safety island with Mr. Wabisky looking toward the Capitol away from you? A. Well, I slowed to eight or ten miles per hour ringing the bells all the time.

Q. But you kept going, is that correct? A. Yes, I did.

107

Q. And approximately how many times would you say that you rang your gong? A. Oh, almost continually, several times, five, six, seven, eight. I don't know how many times I did ring it.

Q. Could it be even more than five, six, seven, or eight? A. I suppose it could.

Q. Now, how far away from the pedestrian are you when you first begin ringing these bells? A. Oh, I think I first started ringing the bells just about from the time I started off on the green light.

Q. So then that would go back to the original figure about 120 feet away, is that correct? A. No, that would almost go back all the way across the intersection.

Q. To what, about 160 feet? A. I suppose.

Q. Now, when you were ringing these bells five, six, seven, eight or more times, did you ring it continuously or did you ring it in a series? Did you ring, stop, and then ring again? A. No, I think I rang it almost continuously.

Q. Now, you testified just a little bit ago to Mr. Roberson that this pedestrian was the only one standing in the safety zone, is that right?

108

A. That is right.

Q. And what was your purpose in ringing the bell six or seven or eight times? A. Well, it was more or less to warn him, to attract his attention, to get him to look at me.

Q. When you rang your bell five, six, seven, eight or more times to get him to look at you to attract his attention to warn him, did the

pedestrian look toward you? A. No, he didn't.

Q. He kept looking toward the Capitol in the opposite direction, didn't he? A. Yes, he did.

Q. Then, Mr. Lane, all the time that you were ringing trying to get his attention, you were not able to attract his attention, were you?

A. I was not able to get him to look at me. Actually, I thought he knew I was coming all the time.

Q. But he was looking in the opposite direction, wasn't he?

A. Yes, he was while he was standing there.

Q. Now, as you went forward as a matter of fact you picked up speed, didn't you? A. Well, when do you mean? I actually picked up speed twice during the course of the accident. I picked up speed when

109 I first took off from the stop light, and also I picked up speed again when I was abreast of Mr. Wabisky.

Q. Well, I am interested in that, sir. As you approached this man as you got closer to the safety island before your side doors came along side of him so that you could see him through there, he did not move, did he? A. No, he did not.

Q. And he doesn't move then as you get closer and closer to him, is that correct? A. He doesn't move until the side doors, until the front side doors are right abreast of him.

THE COURT: Did you say until the side doors or the front doors were abreast of him?

THE WITNESS: I said the front side doors.

THE COURT: The side doors?

THE WITNESS: That is right, the side doors that are in the front of the streetcar. Also, they have side doors that are in the rear.

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117 MR. BINDEMAN: Rule 22(c) of the regulations, Your Honor, which was ruled out at the close of the plaintiff's case, I think is now in a different posture because of the driver's statement.

THE COURT: What do you wish to do now?

MR. BINDEMAN: I wish to introduce in evidence Section 22(c)

of the regulations. It has to do with speed.

THE COURT: Have you any objection?

MR. ROBERSON: Yes, Your Honor.

THE COURT: Then I think you better come to the bench.

(At the bench:)

THE COURT: What is the relevancy of that?

MR. BINDEMAN: The driver has now testified, Your Honor, that he increased his speed before he —

THE COURT: He did not say that.

MR. BINDEMAN: Yes, he did, sir.

THE COURT: I think we should be one hundred percent accurate in stating what somebody else said. He did not say he increased his speed. He said that the streetcar gained speed, which is an entirely different thing; in other words, he was not accelerating the streetcar. He used the words "picked up speed."

MR. BINDEMAN: As he approached the point of impact he
118 said he picked up speed.

THE COURT: It means the momentum of the car was picking up speed.

MR. BINDEMAN: I didn't get that inference.

THE COURT: That is the way I understood it. He said it picked up speed. He did not say he was stepping on the accelerator or whatever the apparatus is on a streetcar that corresponds to the accelerator.

MR. BINDEMAN: I understood that he has so testified in the deposition. Is he still here, Mr. Roberson? So I can call him back.

MR. ROBERSON: No.

THE COURT: Anyway, you are not answering my question. How is 22(c) applicable?

MR. BINDEMAN: That has to do with increasing speed.

THE COURT: Yes, but where?

MR. BINDEMAN: "shall drive under appropriate reduced speed when a special hazard exists with respect to pedestrians." Now, under our theory of the case, Your Honor, with this man standing too close to the streetcar track the speed was increased.

THE COURT: I know. Which of these alternatives are you referring to? It does not say that at all times the driver must.

119

MR. BINDEMAN: It says the driver of every vehicle.

THE COURT: Have you read this?

MR. BINDEMAN: Yes, sir, I think I have.

THE COURT: It enumerates a number of instances in which the driver must reduce his speed. Now, which of those instances is applicable to this case?

MR. BINDEMAN: When a special hazard exists.

THE COURT: There is no evidence of any special hazard.

MR. BINDEMAN: The pedestrian is too close to the tracks under our theory of the case.

THE COURT: That is why I am going to give the instruction last clear chance.

MR. BINDEMAN: Yes, sir.

THE COURT: I do not think this is relevant.

MR. BINDEMAN: Very well, Your Honor.

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Washington, D. C.

January 10, 1963

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JURY CHARGE

THE COURT: Ladies and gentlemen of the jury: We have now come to the end of this trial and the issues are about to be submitted to you for final determination.

As you have been told throughout, this case arises out of a fatal accident that took place on June 26th, 1959, near the intersection

of Pennsylvania Avenue and 13½ Street in this City. Joseph Wabisky at that time came into physical contact with a streetcar of the D. C. Transit System and met his death. This suit is brought by the administratrix of his estate to recover damages for his death, on the theory that his death was caused by some negligence on the part of the motorman who was operating the streetcar for the defendant company. It is for you ladies and gentlemen of the jury to determine whether the plaintiff is entitled to recover damages, that is, whether the motorman was at fault; whether his fault, if he was at fault, caused the accident; and if so, whether the estate of the deceased Wabisky is entitled to recover damages.

121 Your conclusion must be reached solely on the evidence introduced at this trial and on nothing else. You must arrive at your decision fairly and impartially, deliberately and dispassionately, without any feeling or emotion, without any anger on one side or sympathy on the other, because the only question in this case is whether the D. C. Transit System should pay money, should pay damages to the estate of the deceased, Joseph Wabisky.

Before taking up a discussion of the case, I want to remind you, especially as there are some of you for whom this is their first case, that under the system of jury trials in the Federal Courts it is the function of the Court, that is, it is my function and my duty to instruct the jury as to the rules of law that must govern the disposition of the case on trial. You ladies and gentlemen of the jury are bound and obligated to take the law from the Court and to follow the Court's instructions as to the law.

On the other hand, the jury decides the facts. You ladies and gentlemen of the jury are the sole judges of the facts and you must determine the facts yourselves on the basis of the evidence, and solely on the basis of the evidence, introduced at this trial.

In addition to instructing the jury as to the law the Court has a further function to perform, and that is to summarize, discuss and comment on the facts and on the evidence to the extent to which the Court deems it wise and advisable to do so. That, however, is done merely to

122 aid and assist the jury, and the Court's discussion of the facts and the evidence are not binding on you, they are intended only to help you, and you need attach to them only such weight as you deem wise and proper. If your recollection or your understanding or your view of the evidence in any respect differs from mine, then it is your recollection, your understanding and your view of the evidence that must prevail because, as I said a moment ago, the final decision on the facts is solely within your province; my instructions are binding on you only as concerns the law.

In determining the issues of fact submitted to you for decision you will consider and weigh the testimony of all of the witnesses who have testified at this trial, as well as all the circumstances concerning which testimony has been introduced. Circumstances frequently cast an illuminating light on oral testimony.

You are the sole judges of the credibility of witnesses. I mean by that that it is for you, and for you alone, to determine whether to believe any witness, the extent to which any witness should be credited and the weight to be attached to the testimony of any witness. In case there is any conflict in the testimony, as there is in this case, it is for you to decide where the truth lies and what the fact was. So, too, it is your function to decide what inference to draw from the various circumstances
123 and facts concerning which testimony has been introduced.

In determining whether to believe the testimony of any witness and in weighing the testimony of any witness you have a right to consider any circumstance or any factor that may seem to you to have a bearing on the question. For example, you have a right to consider the attitude and the demeanor of the witness on the witness stand, whether the witness impressed you as a truth-telling individual, the witness' manner of testifying, whether the witness impressed you as having an accurate memory and recollection, whether the witness had an opportunity for observing the details concerning which the witness testified, whether the witness had made any contradictory statements concerning the matter in regard to which he gave testimony, whether the witness has any motive for not telling the truth, whether the witness has any interest in the outcome of

this case. All of these matters, as well as anything else that may appear to you to have a bearing on the question, you have a right to consider in determining what testimony to believe.

If you find that any witness deliberately testified falsely as to any material fact concerning which that witness could not reasonably have been mistaken, then you have a right, if you see fit to do so, to disregard the entire testimony of that witness or any part of that witness' testimony.

124

With these preliminary remarks I shall proceed with a discussion of the case that you have to decide.

First, I want to say that the burden is on the plaintiff, as it is generally in civil cases, to prove her claim by a fair preponderance of the evidence. The words preponderance of the evidence merely mean that in order that you may find a verdict for the plaintiff you must be reasonably satisfied that the plaintiff's contentions and allegations are true. Now, of course, this requirement does not mean that the plaintiff must produce a greater number of witnesses than the defendant, but, I repeat, merely that you must be reasonably satisfied of the truth of the plaintiff's allegations and contentions.

Let me state the same thought in a somewhat different way. Preponderance of the evidence means evidence of greater convincing force. The duty of the jury is to weigh the evidence carefully and to find a verdict in favor of the party in whose favor the evidence preponderates. If the evidence is evenly balanced, then the verdict must be in favor of the defendant.

125

The mere fact, of course, that an accident happened does not of itself create a basis for liability on the part of the defendant or anyone else. No one is liable to pay damages unless he was at fault and the damages were caused by his fault. The burden is on the plaintiff, therefore, to show that by some act or omission the defendant violated some duty that he had owed to the deceased and that this act or omission was the proximate cause of the injury and death of which the plaintiff complains.

Under the law of the District of Columbia, if a person or a

corporation by some wrongful act of negligence causes the death of another person, the person or corporation so guilty of the wrongful act of negligence is liable for the damages for the death.

What, then, is negligence? Negligence consists in doing that which a person of ordinary prudence and care would not do under the circumstances of a particular situation, or in omitting to do something that such a person would do under the same circumstances. Negligence may also be defined as failure to use due care such as would be used under similar circumstances by an ordinary reasonably prudent person.

Even if, however, the defendant or his employee was negligent and that negligence was one of the proximate causes of the accident, there is still another question and there is still another rule of law, namely, that if the deceased was guilty of contributory negligence, ordinarily his estate would not be able to recover.

126 Contributory negligence is such negligence on the part of an injured person which, cooperating in some degree with the negligence of the defendant, helps in causing the injury, and if the injury results in death the administrator of his estate may not recover damages for the death.

Every person is under a legal duty to use due care, such care as would be used by a reasonably prudent person for his own protection. Failure to use such care constitutes contributory negligence.

On the issue of contributory negligence the burden is ordinarily on the defendant to show, by a fair preponderance of the evidence, that the deceased was guilty of contributory negligence.

There is, however, an exception to the rule of law that a person's contributory negligence would bar any right to recover on the part of his estate. Now, in this case the plaintiff admits that the deceased was guilty of contributory negligence, but claims that this case is within the exception and that, notwithstanding the contributory negligence of the deceased, the administratrix has a right to recover damages. This exception has a rather picturesque name in the law. It is known as the doctrine of the last clear chance. It is applicable in cases where the injured party or the

deceased was guilty of contributory negligence, and even in such a case the plaintiff would be entitled to recover if the following facts appear:

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First, that the deceased was in a position of danger;

Second, that the deceased was oblivious to the danger or was unable to extricate himself from his position of danger;

Third, that the operator of the streetcar was aware, or by the exercise of reasonable care should have been aware, of the danger of the deceased and of his obliviousness to the danger or inability to extricate himself from the danger;

Fourth, that the operator of the streetcar, with means available to him, would have been able, by the exercise of reasonable care, to avoid striking the deceased after he became aware or should have become aware of his danger and obliviousness or inability to extricate himself from the danger, and yet failed to do so.

Now let me summarize this in simple phraseology and summarize it briefly. If the operator of the streetcar -- well, I think I will modify that slightly. If the deceased was in a position of peril of which he was oblivious or from which he could not extricate himself, and if the operator of the streetcar saw or should have seen that this was the case and the operator, by the exercise of reasonable care, could have avoided the accident but failed to take reasonable steps to do so, the plaintiff is entitled to recover damages, even if the deceased was guilty of contributory negligence. This is known as the last clear chance.

128

Of course, if the situation was that there was no time to avoid the collision, then this rule does not apply.

The plaintiff claims that this case is within this exception. The defendant claims that it is not.

This brings me to a discussion and a summary of the evidence on this vital point. Again, I repeat, what I said at the opening of my remarks, that my discussion of the evidence is not binding on you, it is intended only to help you; you must reach your own decision on the facts and on the evidence. As the Court understands the evidence, it is not disputed that the deceased had intended to cross Pennsylvania Avenue from south to

north near the east line of 13-1/2 Street. Admittedly, there was a safety zone or a safety box marked by white lines on the pavement, shortly south of the south track, that is, the eastbound track, on Pennsylvania Avenue. Between the north line of the safety zone and the track there was a space two feet nine inches wide. So far the facts are not in dispute.

There are two versions, however, as I see it, as to exactly how this accident happened, and you, of course, will have to decide which is the correct version. According to the defendant, what happened was as follows: The deceased reached the safety zone while endeavoring

129 to cross Pennsylvania Avenue and he stopped. The streetcar was proceeding eastward on Pennsylvania Avenue. It had stopped at the intersection immediately west of 13-1/2 Street for a red light. The light for vehicular traffic on Pennsylvania Avenue then changed to green and the walk light for pedestrians showed "Don't Walk." The streetcar started then. The motorman claims that he saw the deceased standing in the safety zone, standing still. The motorman sounded the gong several times. It is not disputed that the gong was sounded several times, in order to warn the deceased that a streetcar was coming. However, the defense claims that after the front doors of the car passed the deceased, the deceased carelessly started to walk forward and came into contact with the side of the car at a point where the car was slightly wider than its front because the car was streamlined, and as a result of the contact the deceased was thrown into the air and shortly thereafter was pronounced dead.

If this version is the correct version of what happened, then your verdict must be for the defendant, because clearly under those circumstances the defendant would be at fault. There would have been no negligence on the part of the motorman, the deceased would have been guilty of contributory negligence, and the doctrine of the last clear chance would not have come into play.

130 The law is that until a reasonable man would conclude otherwise, a streetcar motorman is entitled to assume that an adult pedestrian is oriented, is aware of his surroundings and would not suddenly leave a place of safety and move against a don't walk sign into the path of an oncoming

streetcar which is giving notice of its approach. If you find that Mr. Wabisky suddenly left the safety zone against such a sign, in this case you will return a verdict in favor of the defendant.

However, we have another version of this accident and, as I said before, it is for you to decide which is the correct version. The plaintiff's version is somewhat different. The plaintiff claims that the deceased did not stand still in the safety zone but that he stopped and stood in the narrow space two feet nine inches wide between the safety zone and the track and, therefore, was in a position of danger and that, therefore, the motorman should have been aware, in the exercise of reasonable care, that the deceased was in a position of danger, was oblivious to it or unable to extricate himself, and that the motorman should have, by the exercise of reasonable care, avoided the accident, perhaps by bringing the car to a stop.

Now, that is the plaintiff's contention, and if you find the facts to have been as the plaintiff claims them to have been, then you would have a right to find a verdict in favor of the plaintiff.

131 Now, then, what is the evidence as to these respective versions? There were three witnesses introduced who claimed to have seen the pedestrian, that is, the deceased, immediately before the accident. One, of course, was the motorman.

The motorman, in substance, testified, Mr. Jimmy Lane, that after stopping west of 13½ Street for a red light he started to proceed on the green light. He had seen the deceased walking north across Pennsylvania Avenue in the eastbound lane until after the streetcar started. The motorman further testified that he saw the deceased stop in the safety zone and, therefore, there was sufficient clearance between the side of the streetcar and the deceased. The motorman testified that he sounded his gong, slowed down his car, that the deceased was looking in the opposite direction, towards the Capitol, and that after the front doors of the car passed the deceased he saw the deceased step forward towards the car and come in contact with the side of the car.

Now, the next witness -- well, I am not taking them in order.

Another witness was Lucien Nolin, a gentleman who was a passenger in the streetcar. He testified that he saw the deceased standing not in the safety zone but in the narrow space between the track and the safety zone and that the deceased did not move, and then Mr. Nolin testified that he
132 heard a bang and he saw the deceased fly into the air. Now, on cross-examination, however, Mr. Nolin admitted that he was somewhat confused as to the details of the accident. On the afternoon on which the accident took place he was interviewed by an investigator of the D. C. Transit System and a statement of what he told the investigator was prepared, which Mr. Nolin signed. That statement ends with the following sentence: "I did not see this man until after I heard the thump and looked out and saw him flying through the air."

It is for you to determine what weight to attach to Mr. Nolin's testimony.

The third and last witness who saw the man before the accident was Florence Walker. She, too, was a passenger. Florence Walker testified that she saw the pedestrian standing in the safety zone and that he then walked right into the side of the car, about, she said, the middle of the car. Her testimony was corroborated by the testimony of Margaret Stearns, another passenger, who overheard Florence Walker exclaim, "He walked into the car."

So there you have the two versions of the accident, and it is your function to decide which is the correct version. You have to determine where the truth lies and what the fact was.

Now, if you reach the conclusion on the evidence and in the light of the rules of law that I have summarized for you, that the defendant
133 company is not liable, that it was not at fault, your verdict should be in favor of the defendant and that ends the matter.

However, if you find that the plaintiff is entitled to recover damages, then you have to take one additional step and determine the amount of damages that should be awarded to the administratrix of the estate of Mr. Wabisky.

Now, the law is that damages for death must be limited to

damages of a pecuniary nature, that is, they must be limited and restricted to the recompense and compensation for the financial or money loss sustained as a result of the death. The law does not compensate for grief, for mental suffering or for mental anguish or sentimental loss caused by the death of a member of one's family or other relative. Such matters cannot be paid for in money. The law, therefore, limits the damages for death to such sum as will fairly and reasonably compensate the members of the family of the deceased for any financial loss sustained by reason of the death. In determining the amount of such a loss you have a right to take into consideration payments and contributions that the deceased had made to the support of his family, to what extent it was reasonably proper to expect that such payments would have continued during the life of the deceased, and what the life expectancy of the deceased was. The determination of the amount is within the sound judgment of the jury.

134 Now, of course, it is hardly necessary to say that the fact that some time after the death of her husband the widow has remarried does not affect the amount of damages that may be recovered. It does not diminish the amount of damages to which she is entitled. The damages must be assessed and determined as of the date of the death, as though the trial took place promptly after the death occurred.

Now, on the question of damages, it was shown that the deceased was contributing to the support of his family about \$6,000 per year. Of course, his income was somewhat larger, but part of it went to his own support. So, it is not contradicted that he was contributing about \$6,000 a year to the support of his family. An actuary was called as a witness, who made computations, on the basis of the life expectancy of the deceased as of the date of his death, what the present worth was of his future income, provided he lived through the entire period of his life expectancy, worked during that period and was earning the same amount of money. Now, these figures are not in dispute, but you are not bound by them because you have a right and you should take into consideration the trials and tribulations of life. It may be that the deceased might not have lived the entire life expectancy or he might not have been able to work for the entire period.

On the other hand, he might have gotten a better job and increased his
135 income. Conversely, he might have lost his job and his income might have
been reduced. In other words, these matters are not subject of a mathematical computation. The determination of the amount of damages to be awarded, if the plaintiff is entitled to damages, is in the sound judgment of the jury.

Now, in this case it appears that the deceased left a wife and a little child not quite five years old. The law provides that under such circumstances, if the jury finds in favor of the plaintiff, then it must take the amount of damages that it has awarded and must allocate it as between the surviving spouse and the child. In other words, you would first determine how much the damages should be and then you decide how much of that amount should go to the surviving spouse and how much to the surviving child.

In conclusion, therefore, you may find either one of two verdicts, either for the defendant, or for the plaintiff for a specific sum of money. If you find for the plaintiff you must then also indicate how much of the damages that you award should go to the surviving spouse, Irene Wabisky, and how much to the child, Elizabeth Wabisky.

I think I made a slight error in the age of the child. The child at the time of the accident was about two and a half years old; it is about five years old now.

136 As of course you no doubt are aware, your verdict must be reached by unanimous vote.

Are there any objections or suggestions?

MR. BINDEMAN: May we approach the bench, Your Honor?

THE COURT: Yes, indeed.

(At the bench:)

MR. BINDEMAN: If the Court please, on behalf of the plaintiff I do have one suggestion, and that is that Your Honor make reference to the testimony of the policeman, who said that -- the policeman said that the driver had told him that the decedent had not stepped but merely turned. That is very important to our version of the case, Your Honor.

THE COURT: Well, you argued that to the jury. I don't think I need say anything about it.

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137

THE DEPUTY CLERK: Counsel in the Wabisky case please come to the bench.

(At the Bench:)

THE COURT: I have a note from the jury, gentlemen, which reads as follows: "We would like to have the transcript of Officer Mason's testimony. If that is not possible, we would like to know where the dimension seven feet three inches was measured from. We would like to know where precisely the piece of one square inch straw was found."

Now, there are three questions, in other words.

We have a transcript of Mason's testimony. Ordinarily, I am not in favor of giving a jury a transcript of anybody's testimony. We can have it read, of course. On the other hand, if both sides are content to have it go to the jury room, the Court has no objection, of course.

MR. ROBERSON: I do object. I do object. I think it unduly emphasizes one witness' testimony.

THE COURT: Well, of course, then, I shall have it read to them.

MR. ROBERSON: The portions that they are interested in answering, I think if they are in there, they can be read to them.

THE COURT: Let's see.

138

MR. BINDEMAN: Your Honor, I don't think we should speculate. They have asked, as I understand what you said, for Officer Mason's --

THE COURT: I am going to bring in the jury and ask them what part of the testimony they want to have read.

MR. BINDEMAN: May I inquire what the statement asks for? It asks for his testimony, doesn't it?

THE COURT: Well, "if that is not possible," but this is possible.

I am going to bring in the jury.

MR. BINDEMAN: I would ask that that testimony be read to the jury in its entirety.

THE COURT: I am going to have read only so much of it as the jury asks for. I shall be guided by the jury's desire, rather than by counsel's.

"We would like to know where the dimension seven feet three inches was measured from." My understanding of the testimony it was from the car. If you are both agreed, I will be very glad to say that to the jury.

MR. BINDEMAN: From the front of the car, Your Honor, was the testimony; that is correct.

THE COURT: You agree with that?

MR. ROBERSON: Yes, I think it's the front corner post.

MR. BINDEMAN: No, he didn't say that. He said from the front of the car was seven foot three inches.

THE COURT: I understood it was from the front of the car.

139 MR. ROBERSON: I think that was the substance of what he said. I don't know what he meant by the front of the car.

THE COURT: The jury will have to decide that. I do not think that the Court should interpret testimony.

MR. ROBERSON: No.

MR. BINDEMAN: This also was answered by Officer Mason's testimony.

THE COURT: I understand, but maybe we can eliminate spending half an hour having the testimony read to the jury.

"We would like to know where precisely the piece of one square inch straw was found." Can we agree on that?

MR. BINDEMAN: Seven foot three inches from the front. That is the measurement.

MR. ROBERSON: That is true.

THE COURT: Seven foot what?

MR. ROBERSON: Three inches from the front of the car.

THE COURT: How high up?

MR. BINDEMAN: Five foot eight inches.

MR. ROBERSON: I think that is right.

THE COURT: Five feet eight inches. Very well, we will bring in the jury.

MR. BINDEMAN: That is my recollection, five foot eight. I wonder if I might check that with my notes to be certain.

140 THE COURT: Very well, you may do that.

(In Open Court)

THE COURT: The Reporter informs the Court that only the direct testimony of the Officer has been transcribed, but not the cross. But, of course, his notes are available.

MR. BINDEMAN: And if the Court please, my notes do verify that the measurement was five feet eight inches from the ground.

THE COURT: From where?

MR. BINDEMAN: From the ground. That is the piece of straw, Your Honor.

THE COURT: And you agree with that, Mr. Roberson?

MR. ROBERSON: That is my recollection, Your Honor.

THE COURT: Very well. You may bring in the jury.

(The jury resumed the jury box.)

THE COURT: Will the foreman please rise.

Mr. Foreman, the Court has received your note, which reads as follows: You may resume your seat. "We would like to have the transcript of Officer Mason's testimony. If that is not possible, we would like to know where the dimension seven feet three inches was measured from. We would like to know where precisely the piece of one square inch straw was found."

141 Now, taking up these items one by one, only a part of Officer Mason's testimony has already been transcribed. In any event, it is not customary to give a transcript of testimony to the jury. However, you have a right to have it reread to you and the Reporter can reread either the entire transcript of Officer Mason's testimony or any part of it, as you wish. But before we take that up, the second question is, "We would like

to know where the dimension seven feet three inches was measured from." Counsel on both sides are agreed that that distance was measured from the front of the car. Now, there is no information, as I recall it, as to exactly what point in the front of the car.

The next question is, "Where precisely the piece of one square inch straw was found." Well, it was found, according to the testimony, and everyone is agreed this is the testimony, seven feet three inches back of the front of the car and five feet eight inches from the ground.

Now, does that answer those two questions?

THE FOREMAN: No, Your Honor, it does not. The front of the streetcar is curved, in cross-section. If you take a vertical cross-section looking down, there is not a precise front of the streetcar.

THE COURT: Unless my recollection is in error -- and if so, I wish counsel would so state -- I don't think that dimension is clarified in the testimony.

MR. BINDEMAN: I don't think so either, Your Honor.

142 THE COURT: Do you agree with that, Mr. Roberson?

MR. ROBERSON: I had some recollection that it was from the front corner post, in front of the front doors, but I don't know whether that is in Officer Mason's testimony or not.

THE COURT: I am afraid we will have to let it rest at that, Mr. Foreman, because the testimony does not seem to be any more definite than just seven feet three inches from the front, wherever they might measure it from, but what particular spot in the front has not been clarified.

THE FOREMAN: Your Honor, was it shown at any time how far to the rear of the rear part of the front door the straw was found?

THE COURT: Does it show what?

THE FOREMAN: Was it shown how far toward the rear from the rear portion of the front door this piece of straw was found?

THE COURT: How far from the middle door, is that it? From the rear door?

THE FOREMAN: No, sir. The front door is five feet in width.

THE COURT: I have no recollection that there was any testimony on that point. What do counsel say?

MR. ROBERSON: My note of Officer Mason's testimony is he said the straw was five feet eight inches from the ground and seven feet
143 three inches back from the front of the car, which is just to the rear of the front doors.

THE COURT: We are all agreed, I think, that is the testimony.

MR. BINDEMAN: Yes, sir, except that my recollection is that it was on the molding, because there was testimony that Your Honor may remember from Mr. Mason that the straw was right about where the molding was.

THE COURT: Yes, but we don't have the measurement of the molding. But there is no dispute as to measurements.

MR. ROBERSON: No.

MR. BINDEMAN: No, sir.

THE COURT: Does that answer your question?

THE FOREMAN: Your Honor, could we have it described by pointing on the photograph, the photograph of the side of the streetcar?

THE COURT: You are entitled to have all the photographs that have been received in evidence. Would you like to have them?

THE FOREMAN: If we may, please.

THE COURT: Yes, the Clerk will hand to the Marshal all of the photographs that have been offered in evidence.

I assume there is no objection on the part of counsel.

MR. ROBERSON: No.

144 MR. BINDEMAN: No.

THE COURT: You may have them in the jury room.

Now do you still want any other part of Officer Mason's testimony?

THE FOREMAN: Yes, Your Honor, if we may.

THE COURT: Now what part would you like to have?

THE FOREMAN: I would have to consult with one of the other jurors.

THE COURT: Would you want to consult your colleagues right in the box?

THE FOREMAN: If I may.

THE COURT: Yes, you may. Surely.

(There was a private discussion in the jury box.)

THE FOREMAN: Your Honor, the question the jury has is, what precisely was the point of contact on the streetcar?

THE COURT: The point of impact?

THE FOREMAN: Of impact.

THE COURT: Between the deceased and the streetcar?

THE FOREMAN: Yes, sir.

THE COURT: According to the testimony, as I understand it, it was seven feet three inches back of the front. Now, the exact point in the front from which the measurement was taken is not shown; is this correct, gentlemen?

MR. ROBERSON: That is my recollection.

MR. BINDEMAN: That is correct, except there was testimony
145 that it was on the protrusion, that ledge that stuck out, Your Honor, two and three-quarter inches, if Your Honor remembers. That is in the stipulated measurements. I don't know if among the exhibits --

THE COURT: The only exhibits we are sending are the photographs.

MR. BINDEMAN: May I inquire with respect to the exhibit that had the measurements which are stipulated by counsel?

THE COURT: You may not.

MR. BINDEMAN: Very well, sir.

THE COURT: The jury has requested the photographs and I am sending those photographs.

Does that answer your question?

THE FOREMAN: Could the point of impact have been the edge, or was it on a flat side of the car?

THE COURT: Are both of you agreed on that, gentlemen?

MR. ROBERSON: I don't know the answer to that.

MR. BINDEMAN: Well, I know what the testimony was.

THE COURT: That is what I mean. I am not asking you to agree what the point of impact was, but are we agreed that this is the testimony?

MR. BINDEMAN: It was on the sharp edge of the projection, Your Honor, which we concede is two and three-quarter inches projecting outward.

146 MR. ROBERSON: Your Honor, I don't think we ought to argue our recollection of the testimony.

THE COURT: I thought that was agreed upon. Suppose you come to the bench, gentlemen.

(At the Bench:)

THE COURT: Can we agree upon the point of impact?

MR. ROBERSON: We have already agreed on that. I thought we had already agreed it was seven-point-three inches back and five-point-eight from the ground.

THE COURT: That is what I thought.

MR. ROBERSON: It was on the widest part of the streetcar. Now, what the widest part was I don't know.

MR. BINDEMAN: Mr. Ostrum's testimony was that the widest part of the streetcar was the projection.

THE COURT: I know.

MR. BINDEMAN: And we stipulated as to the measurement.

THE COURT: Suppose you go back to counsel table.

(IN OPEN COURT:)

THE COURT: The testimony is, Mr. Foreman, that the point of impact was seven feet three inches back of the front of the streetcar and five feet eight inches from the ground. That is as far as the testimony is undisputed.

THE FOREMAN: Thank you, Your Honor.

147 THE COURT: Now is there anything else that either you or any other member of the jury would like to have?

THE FOREMAN: No, sir, we have no further questions.

THE COURT: Thank you. If you should, you can always come back.

THE FOREMAN: Thank you.

THE COURT: You may retire to deliberate. The Marshal is bringing the photographs.

Lucien Nolin
5301 R St. S.E.



3105 R1

DEF'S. EX. 1
FOR ID.

Your name has been given to us as being present at the accident mentioned below. It will greatly assist us in our effort to learn the cause of the accident if you will answer these questions and forward them to us in the enclosed envelope.

Your help will better enable us to be fair and just in determining who was to blame, which we assure you is our honest endeavor.

D.C. TRANSIT SYSTEM, INC.

DATE OF ACCIDENT 6-26-59 FILE NUMBER 74
LOCATION 13 1/2 St & Penn. Ave N.W.
NATURE Streetcar / Pedestrian collision

- 1 - Did you see the accident above mentioned? Partially
- 2 - Where were you when it occurred? If seated, where? If standing, where? Seated in the second single seat on the right side of the streetcar
- 3 - What was the direct cause of the accident? Do not know
- 4 - Was the street car ~~was~~ standing, starting, stopping or running between stopping points? between points If moving, how fast? average
- 5 - Was vehicle ~~or~~ person at a standstill or moving at time of accident? unknown If moving, how fast? In what direction?
- 6 - When the vehicle ~~or~~ person got on the track, how close was the street car? Did not get on tracks
- 7 - How far did street car ~~was~~ go after accident before stopping? about 1/2 a st. car length
- 8 - What warning was given prior to accident? Street car bell
- 9 - What effort, if any, to avoid the accident was made by the street car ~~was~~ operator? Nothing
as much a suprise to him as it was to me
- 10 - Did vehicle ~~or~~ person come from behind anything? unknown If so, what?
- 11 - Which vehicle entered the intersection first?
When it entered the intersection, how far (number of feet) was the other vehicle from the intersection?
- 12 - What color was the traffic signal light for street car ~~was~~ when it entered the intersection? Do not know
- 13 - What part of street car ~~was~~ struck what part of vehicle ~~was~~ / person? Front exit door of street car and man
- 14 - Do you know anyone else who witnessed the accident? If so, please give names and addresses: None

15 - Kindly give to the best of your knowledge a full account of accident as witnessed by you, stating what first attracted your attention thereto; whether person concerned was infirm or in other than a normal condition; and any other information bearing upon the facts.

I was a passenger on a #54 streetcar as we came south on 14th street made a left turn onto Pennsylvania Ave and stopped for a traffic light at 13 1/2 St. There were no passengers standing near

Any additional facts you would like to express may be written on the reverse side hereof.

Date of Signature (Signature in full)
Residence Above Place of Business Area Construction Co Inc
Telephone No. JO 8-6546 Telephone No. LA 6-5215
1424 K St. N.W. Rm 515

the front of the street car and no one ~~was~~ talking to the driver. The street car driver started across 12¹/₂ st, ringing the bell. I did not look at the traffic light ~~at~~ the time, but assume it was green. The street car was moving at an average speed and I was looking straight ahead when I heard a loud thump at the front doors. I looked out of the window on my right and saw a man flying through the air away from the street car. The driver stopped the street car in about 1/2 a street car length and ~~the street~~ he got off of the car and I followed him back to where the man was lying on his left side in the street and bleeding badly from the head. His feet were near the tracks and his head was away from the tracks at an angle toward the south curb of Penn Ave. I did not see this man until after I heard the thump and looked out and saw him flying through the air

I have read both sides
of this paper it is
correct

J. J. Larkin

June 24/89

[Filed January 11, 1963]

VERDICT AND JUDGMENT

This cause having come on for hearing on the 7th day of January, 1963, before the Court and a jury of good and lawful persons of this district, to-wit:

* * * *

who, after having been duly sworn to well and truly try the issues between Irene Wabisky, individually, and as Ancillary Administratrix of the estate of Joseph L. Wabisky, deceased, plaintiff and D. C. Transit System, Inc. a corporation, defendant and after this cause is heard and given to the jury in charge, they upon their oath say this 11th day of January, 1963, that they find for the defendant against said plaintiff.

WHEREFORE, it is adjudged that said plaintiff take nothing by this action, that said defendant go hence without day, be for nothing held and recover of plaintiff his costs of defense.

Harry M. Hull, Clerk,

By * * *

By direction of

Judge ALEXANDER HOLTZOFF

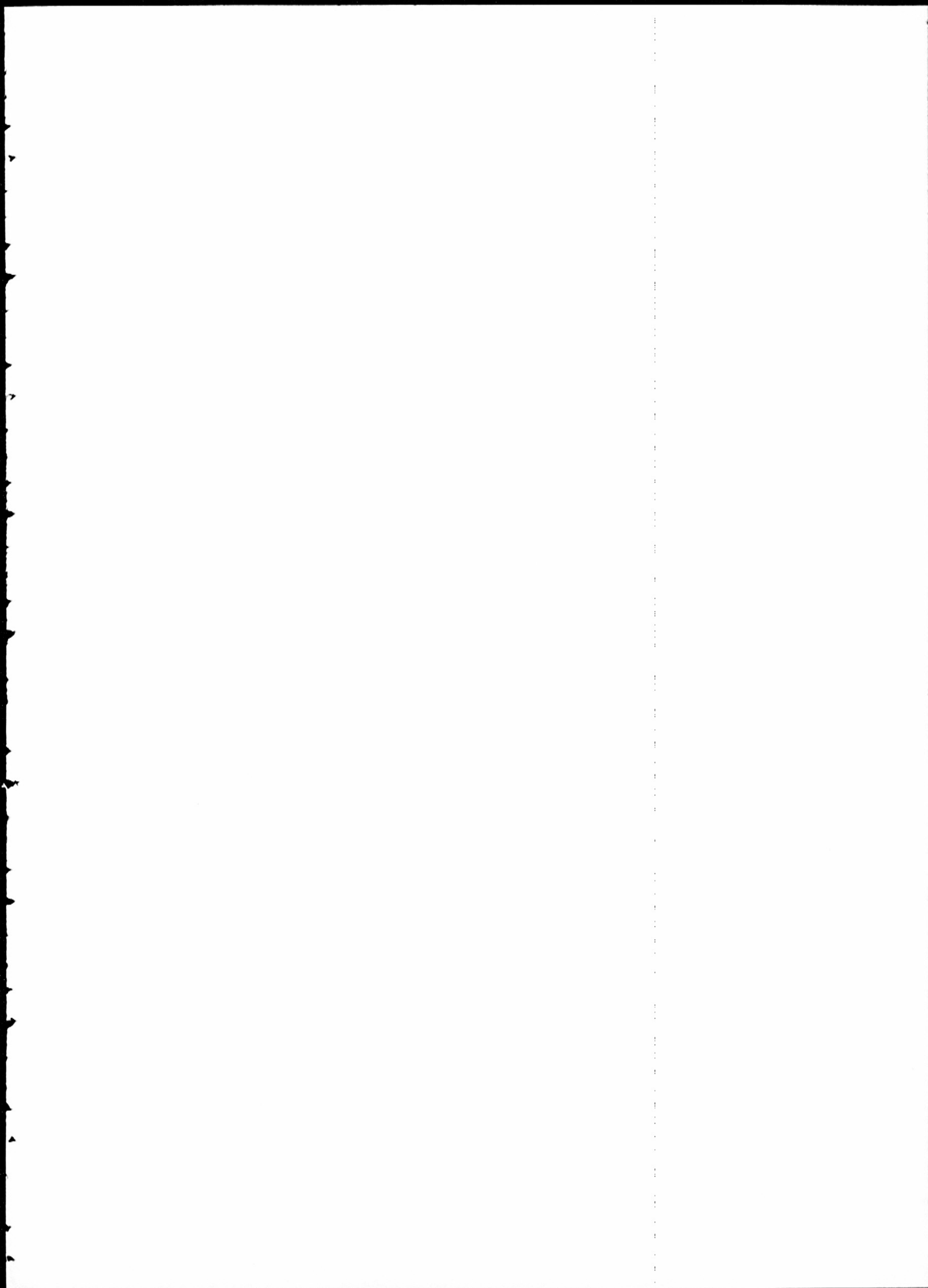
[Filed February 7, 1963]

NOTICE OF APPEAL

Notice is hereby given this 7th day of February, 1963, that IRENE B. WABISKY, Individually and as Ancillary Administratrix of the Estate of Joseph L. Wabisky, deceased, Plaintiff, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 11th day of January, 1963, in favor of Defendant against said Plaintiff.

/s/ J. E. BINDEMAN
Attorney for Plaintiff
606 Landmark Building
1343 H Street, N. W.
Washington 5, D. C.

* * *



36
BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,720

IRENE B. WABISKY, Individually and as
Ancillary Administratrix of the Estate
of Joseph L. Wabisky, deceased,

Appellant,

vs.

D. C. TRANSIT SYSTEM, INC.,

Appellee.

Appeal from the United States District Court for the
District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 6 1963

Nathan J. Paulson
CLERK

FRANK F. ROBERSON

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Washington 5, D. C.

Attorneys for Appellee.

HOGAN & HARTSON
Of Counsel

(i)

STATEMENT OF QUESTION PRESENTED

Whether a jury verdict for defendant should be overturned and a third trial ordered where the trial judge gave the jury a complete and fair instruction and answered questions posed by the jury in a correct fashion without objection.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,720

IRENE B. WABISKY, Individually and as
Ancillary Administratrix of the Estate of
Joseph L. Wabisky, deceased,

Appellant,

v.

D. C. TRANSIT SYSTEM, INC.,

Appellee.

Appeal from the United States District Court for the
District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

The appellant, Irene Wabisky Bradley, individually and as ancillary administratrix of the estate of her husband, Joseph L. Wabisky, as plaintiff below sued the appellee D. C. Transit System, Inc., for damages for the wrongful death of Mr. Wabisky, claiming that a D. C. Transit street-car struck him at or near the south safety island of the intersection of Pennsylvania Avenue at 13 1/2 Streets, N. W.

The first trial of this case resulted in a directed verdict for the defendant granted at the close of the plaintiff's case. This Court reversed, Wabisky v. D. C. Transit System, Inc., 309 F.2d 317 (D.C. Cir., No. 16,884, Oct. 25, 1962), holding that the case should have been submitted to the jury's determination as to whether defendant had had a last clear chance to avoid the collision.

The new trial, before a different judge, resulted in a jury verdict for the defendant. This appeal is based primarily on the theory that the jury instructions were so unfair, slanted, and weighted in favor of the defendant that plaintiff was deprived of a fair trial. Subsidiary points are that the judge failed to answer properly a question posed by the jury during deliberation; that he erred in not admitting into evidence a traffic regulation; and that he failed to permit a witness to explain an ambiguous prior statement which contradicted his trial testimony.

Since the points now raised by appellant are basically procedural, the relevant portions of the proceedings will be reviewed in the course of the responsive arguments of this brief. This counterstatement will include only the broadest outline of the facts, and will point out one glaring omission in appellant's statement of the case.

Shortly before noon on June 26, 1959, the decedent undertook to walk from south to north across Pennsylvania Avenue at the east side of 13 1/2 Street. (J.A. 5, 6, 30, 31). At the same time one of defendant's streetcars, being operated in an easterly direction on Pennsylvania Avenue, was waiting for a red light at the west side of 13 1/2 Street. (J.A. 30, 32). When the light turned green for the eastbound streetcar, the traffic control sign governing the northbound pedestrian, Mr. Wabisky, turned to "DON'T WALK." As he started up, the motorman saw decedent walking¹ across the eastbound traffic lanes. (J.A. 33). As he approached,

¹ Appellant's brief is in error at p. 2 where it recites that the operator first saw decedent standing still looking in the opposite direction.

he watched decedent walk into a safety square, painted onto the street, the north edge of which was some three feet south of the south rail of the tracks. (J. A. 12, 33). The operator slowed the streetcar to about 8 to 10 miles per hour and rang the gong. (J. A. 33). When the streetcar drew abreast of decedent and began to pass by him the operator looked to his right through the front side doors. The decedent seemed to turn to his left and step forward toward the streetcar. (J. A. 35). As it was abreast of decedent, the streetcar had begun to pick up speed. (J. A. 38). Just after he saw the pedestrian turn, the operator heard a thump, looked back and saw decedent fly back off the side of the streetcar. (J. A. 36).

The operator's testimony that decedent had been standing within the safety zone was corroborated by the account he gave at the scene to the police investigator. (J. A. 17). A passenger witness also testified that decedent had been standing within the safety zone as the car approached and that he had walked into the side of the streetcar. (J. A. 28, 29).

Another passenger testified that at the time of the impact she heard a passenger exclaim, "He walked into the car." (Tr. Vol. II, p. 23).

The witness Nolin, a passenger, testified that he saw decedent standing between the safety zone and the track as the streetcar approached. (Tr. Vol. I, p. 31). However, he admitted to be accurate a statement he signed on the day of the accident that he had not seen the decedent until after he heard a thump and saw him flying through the air. (J. A. 26). With regard to whether the decedent stepped into the side of the streetcar, Officer Mason testified that at the scene the operator could not say the decedent had stepped. (J. A. 18).

In support of the appellant's principal point on appeal, that the judge's instruction was prejudicial, appellant's brief quotes that instruction for some 2 1/2 pages. The major effort is to show that the judge omitted something, i. e., contradiction of the streetcar operator's testimony by means of a police officer's account of what the operator said

at the scene.

Astonishingly, the appellant's brief omits an important part of the judge's instructions on last clear chance. The appellant's brief quotes at page 5 the following words from the jury instruction:

" This brings me to a discussion and a summary of the evidence on this vital point . . . "

Appellant's brief then omitted the following words, substituting for them three periods: (J.A. 45).

Again, I repeat, what I said at the opening of my remarks, that my discussion of the evidence is not binding on you, it is intended only to help you; you must reach your own decision on the facts and on the evidence.

Then, after omitting only a short mention of undisputed facts, the appellant's brief for 2 1/2 pages quotes the entire last clear chance instruction to its conclusion.

After the full instructions, (J.A. 40, et seq.) the case was submitted to the jury, which subsequently returned a verdict for defendant.

SUMMARY OF ARGUMENT

The Court's instructions as a whole were fair and impartial. It was neither necessary nor appropriate for the Court, in commenting upon the evidence bearing upon the doctrine of last clear chance, to summarize the testimony of Officer Mason. His testimony was equivocal and its recounting would have harmed appellant as much or more than it would have helped her.

The Court adopted the superior of the two alternative methods of answering the jury's note regarding measurements. The Court was not required to repeat to the jury the appellant's counsel's answer, given in open court, to the jury's question whether the point of impact was on the flat side or an edge of the streetcar. The jury there did not ask for any particular witnesses' testimony, but asked a question of fact the answer to which was not stipulated. Appellant waived any objection to the handling of the jury's inquiries by failure to object.

The traffic regulation regarding speed had no place in this last-clear chance case and would only have confused the jury. Any forward motion of a streetcar against an oblivious pedestrian on the tracks would produce injury. Therefore it is not in order to admit evidence as to proceeding at an "appropriate reduced speed." The trial judge correctly observed that his last-clear-chance instruction fully covered appellant's position.

The appellant was not harmed by being prevented from asking the witness Nolin to clarify a portion of a prior contradictory signed statement, for that statement was perfectly clear. The witness Nolin was permitted to explain the inconsistency between that statement and his testimony at trial.

ARGUMENT

I

THE TRIAL JUDGE INSTRUCTED THE JURY CORRECTLY. HIS COMMENTS ON THE ISSUE OF LAST CLEAR CHANCE WERE FAIR TO BOTH SIDES.

Appellant's principal point on appeal is that the Court's instructions relating to the doctrine of last clear chance were one-sided and weighted in favor of the appellee. The appellant contends that the Court, in commenting on the evidence on that issue, omitted reference to the testimony of a policeman, and contends further that the Court, in commenting on the testimony of a second witness gave only the version of his testimony which favored the defendant. Both of those contentions are without merit.

The policeman was not a witness to the accident. The only purpose served by his testimony was the recounting of certain remarks allegedly made at the scene by various witnesses, and supplying details concerning the physical circumstances. Appellant complains that the omission by the Court of mention of his testimony in commenting upon the evidence relating to the last clear chance was harmful to her. Actually,

the policeman's testimony was equivocal, and while some of it favored appellant's version, other portions of it favored appellee's.

Specifically, appellant points out that the officer testified that the operator, in describing the occurrence, stated that he could not say that the decedent had "stepped" into the streetcar. (J.A. 18). Later in the trial, the operator took the stand and actually testified that the decedent "seemed to turn and step forward toward the streetcar." (J.A. 35). He testified decedent did so as the front doors of the streetcar passed him and immediately before contacting the side of the streetcar. Appellant's counsel did not question him concerning the alleged prior inconsistent statement.

If the Court had commented on the police officer's testimony that the operator did not say the decedent "stepped" into the car, the Court in fairness would have had to include other testimony on the same aspect of the case by the same witness which hurt appellant's case, since the policeman testified that the operator also recounted to him that the decedent pedestrian was entirely within the safety box as the streetcar moved toward the pedestrian. (J.A. 17, 19). The safety box was three feet from the nearest rail of the streetcar tracks. (J.A. 12). The maximum overhang of the streetcar was stipulated to be only 14 1/2 inches. The operator admittedly told the policeman that the decedent turned as the front doors passed him. It is an inescapable inference from this that the decedent pedestrian moved forward a distance of almost two feet as he turned; otherwise, his body would not have come into contact with the side of the streetcar. To have commented to the jury only upon the officer's remarks about "stepping," and not to have commented also upon his neutralizing testimony concerning the location of the pedestrian in the safety box and the fact of distance between the box and the streetcar, would have been manifestly unfair to the appellee. Since different inferences could be drawn from the officer's testimony concerning the operator's remarks, and since those inferences cancelled each other out, the Court quite properly left it up to counsel to do their own commenting upon it. It is ordinarily the function of counsel to invite

the jury's attention to aspects of the evidence which they feel support their cause. Prudential Ins. Co. v. Lear, 31 App. D.C. 184, 192 (1908).

Another phase of the policeman's testimony had a bearing upon the doctrine of last clear chance, and had the Court commented upon it to the jury the appellant's thin case would have suffered. The appellant's witness Nolin gave some testimony on direct examination to the effect that he saw the decedent in a place of danger between the safety box and the streetcar track as the streetcar approached. (Tr. Vol. I, p. 31). The Officer testified that he got the names of two other witnesses at the scene, Margaret Stearns and Lucien Nolin. (J. A. 19). He further testified as to the two other witnesses to whom he talked, Stearns and "Nolan," that "all they told me was that they saw the man as he went back." (See stipulation, J. A. 29). Thus, the policeman's testimony in that regard contradicted the testimony of the only witness who testified at trial that he saw the decedent between the safety box and the rail.²

Appellant's second contention with regard to the "one sided" and "weighted" comment upon the evidence is that the Court gave only one version of the testimony of the witness Nolin, that beneficial to the appellee. Nolin's testimony appears at J. A. 20 through 26. Although he testified under examination by appellant's counsel that he saw the witness between the safety box and the streetcar rail before the accident, he was discredited by a signed prior self-contradictory statement, made on the day of the collision (Appellee's Exhibit No. 1, J. A. 59), that "I did not see this man until after I heard the thump and looked out and saw him flying through the air."

2 At J. A. 19, Officer Mason referred to Lucien Nolin. At J. A. 29 he referred to a Richard Nolan. In both instances he indicated that there were only two other witnesses, the second of whom was Margaret Stearns. Thus it may fairly be assumed that the different form of the witness' name is merely a court reporter's mistake, or the officer's. The testimony at J. A. 29 was lifted by stipulation from the transcript of the coroner's inquest. No second person with the name Nolin or a similar name appears.

Appellant's contention that the Court recited only that version by Mr. Nolin which favored the appellee is not worthy of extended discussion because the mere quotation of the judge's comments refutes it. The judge first gave the appellant's side of Nolin's testimony, and then recounted the gist of his written statement.³

Instruction Must Be Considered As A Whole

The gist of appellant's argument on this point is that the trial Court, by omitting the supposed prior self-contradiction of the operator, impaired the jury's ability to perform its fact-finding function.

Appellant's brief nowhere mentions that the Court, at the beginning of its instructions, made clear the jury's function (J. A. 41, et seq.), saying inter alia:

It is for you ladies and gentlemen of the jury to determine whether the plaintiff is entitled to recover damages, that is, whether the motorman was at fault; whether his fault, if he was at fault, caused the accident; and if so, whether the estate of the deceased Wabisky is entitled to recover damages.

³ The following excerpt of the judge's instructions is taken from page 48 of the Joint Appendix:

Another witness was Lucien Nolin, a gentleman who was a passenger in the streetcar. He testified that he saw the deceased standing not in the safety zone but in the narrow space between the track and the safety zone and that the deceased did not move, and then Mr. Nolin testified that he heard a bang and he saw the deceased fly into the air. Now, on cross-examination, however, Mr. Nolin admitted that he was somewhat confused as to the details of the accident. On the afternoon on which the accident took place he was interviewed by an investigator of the D. C. Transit System and a statement of what he told the investigator was prepared, which Mr. Nolin signed. That statement ends with the following sentence: "I did not see this man until after I heard the thump and looked out and saw him flying through the air."

It is for you to determine what weight to attach to Mr. Nolin's testimony.

Your conclusion must be reached solely on the evidence introduced at this trial and on nothing else.

The Court also told the jury that it was its duty to instruct as to the law and added:

On the other hand, the jury decides the facts. You ladies and gentlemen of the jury are the sole judges of the facts and you must determine the facts yourselves on the basis of the evidence, and solely on the basis of the evidence, introduced at this trial.

In addition to instructing the jury as to the law the Court has a further function to perform, and that is to summarize, discuss and comment on the facts and on the evidence to the extent to which the Court deems it wise and advisable to do so. That, however, is done merely to aid and assist the jury, and the Court's discussion of the facts and the evidence are not binding on you, they are intended only to help you, and you need attach to them only such weight as you deem wise and proper. If your recollection or your understanding or your view of the evidence in any respect differs from mine, then it is your recollection, your understanding and your view of the evidence that must prevail because, as I said a moment ago, the final decision on the facts is solely within your province; my instructions are binding on you only as concerns the law.

The Court also stated: (J. A. 42).

You are the sole judges of the credibility of witnesses. I mean by that that it is for you, and for you alone, to determine whether to believe any witness, the extent to which any witness should be credited and the weight to be attached to the testimony of any witness. In case there is any conflict in the testimony, as there is in this case, it is for you to decide where the truth lies and what the fact was. So, too, it is your function to decide what inference to draw from the various circumstances and facts concerning which testimony has been introduced.

The Court informed the jury that in weighing the testimony of the witnesses they could consider, among other things, "whether the witness had made any contradictory statements concerning the matter in regard to which he gave testimony," an instruction which, according to the appellant's presentation of the case, should have been in its favor with reference to the testimony of the operator. The statement of the

Court with respect to the fact-finding and evidence-weighting duties of the jury certainly make the instructions in the case, as a whole, fair and correct.

Furthermore, the Court began its remarks on the section of the charge complained of with the following observation: (J. A. 45).

Again, I repeat, what I said at the opening of my remarks, that my discussion of the evidence is not binding on you, it is intended only to help you; you must reach your own decision on the facts and on the evidence.

As noted above, in setting out the charge on last clear chance in the statement of facts of its brief, appellant denoted the existence of the foregoing sentence with only three periods. After completing his comments on the evidence relating to the application of the doctrine of last clear chance, the Court said to the jury, "You have to determine where the truth lies and what the fact was."

In evaluating the complaints which the appellant makes against the charge, the instructions must be weighed as a whole. Hecht Co. v. Jacobsen, 86 U.S. App. D.C. 81, 180 F.2d 13 (1950). It is clear that the Court gave a fair summary of both sides' positions on the last clear chance doctrine, and summarized the evidence favorable to both sides. By not commenting on the policeman's equivocal testimony, the Court harmed neither side.

Cases Cited By Appellant Are Not In Point

That the Court in its comments upon the testimony presented both sides of the issue of last clear chance differentiates the case from the case of Sperber v. Connecticut Mut. Life Ins. Co., 140 F.2d 2 (8th Cir.), cert. denied, 321 U.S. 798 (1944), relied upon in appellant's brief. In Sperber, plaintiff sued two insurance companies with which he had disability policies. His claim was that the loss of one arm rendered him totally disabled. In one insurance policy application, the plaintiff stated that he was an executive managing beauty shop operations, an occupation in which one would not be totally disabled by the loss of one arm. In the other application, the plaintiff stated his

occupation as that of hairdresser, thus suggesting that the loss of an arm would disable him. In instructing the jury, the judge made reference to the application which showed the plaintiff's duties to be managerial, but refused to mention the application which referred to plaintiff's duties as those of a hairdresser. In other words, the court totally refused to give one side of an important issue, but gave the other. In the case at bar, the Court gave both sides of the last clear chance issue, and did not mention the equivocal testimony of an additional witness. The cases are clearly distinguishable.

The other cases cited by the appellant are equally inapplicable. Virginian Ry. v. Armentrout, 166 F.2d 400 (4th Cir. 1948), features a highly partisan instruction favoring a local minor plaintiff over a foreign railroad corporation defendant. The judge demonstrated that he had taken the side of the plaintiff by passage after passage of his instructions, and in effect recommended to the jury the application of the doctrine of falsus in uno against two of the defendant's witnesses. . . That opinion, an example of the degree of partisanship which is required for reversal of a case by reason of the faulty instructions of the judge, demonstrates that in the case at bar the verdict of the jury should be affirmed. The impartial nature of the instruction here is emphasized by comparing it with Armentrout.

McGlothan v. Pennsylvania R.R., 170 F.2d 121 (3rd Cir. 1948), cited by appellant, is distinguishable from the case at bar because the trial judge there made a misstatement of fact in his resume of the case to the jury. When he was informed by counsel of the area of fact in which he had made his mistake, the court "insisted upon the correctness of its statement, instead of referring the doubt to the conceded trier of the facts." *Id.* at 125.

The holding in the criminal case of Quercia v. United States, 289 U.S. 466 (1933), cited by appellant, has no bearing at all on the case at bar. There the trial judge, in his instructions, told the jury that he thought every word of the defendant's testimony, except when he agreed with the prosecution, was a lie. The judge also pointed out

that the fact that the defendant wiped his hands while testifying indicated he was lying. There was nothing in the instructions of the trial judge in the case at bar which even remotely resembled that behavior.

Since the trial Court in this case did not depart from its role to usurp the fact-finding functions of the jury, and did not become an advocate for either side, the verdict of the jury should stand. The Court's conduct was well within the role of the judge as spelled out in Capital Traction v. Hof, 174 U.S. 1, 13, 14, 15, 16 (1899), citing Vicksburg & Meridian Ry. v. Putnam, 118 U.S. 545, 553 (1886), where the Supreme Court in reviewing the historic role of a judge in a jury trial pointed out that:

the judge, in submitting a case to the jury, may, at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts; and the expression of such an opinion, when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury, cannot be reviewed on writ of error.

II

THE TRIAL JUDGE ADOPTED THE BETTER OF ALTERNATIVE METHODS OF ANSWERING THE JURY'S NOTE CONCERNING MEASUREMENTS. APPELLANT IS PRECLUDED BY ABSENCE OF OBJECTION FROM COMPLAINING ON APPEAL OF THE HANDLING OF THE JURY'S QUESTIONS.

Arguments II and III of the appellant's brief concern a note sent to the Court by the jury. (J.A. 51). It stated:

We would like to have the transcript of Officer Mason's testimony. If that is not possible, we would like to know where the dimension seven feet three inches was measured from. We would like to know where precisely the piece of one square inch straw was found.

The jury's request for Mason's testimony must be evaluated in light of what appellant's counsel correctly concedes at page 15 to be an

alternative to the request for Mason's testimony. The alternative was the supplying of the answers to two questions: (1) from where was the dimension of seven feet three inches measured; and (2) where precisely was the one square inch straw found.

The Court followed the better course when it worked out with counsel the correct answers to the alternative requests, rather than giving the jury the transcript of Mason's testimony or having the reporter read it back to them. (J.A. 51 et seq.). To give the jury the transcript of Mason's testimony was impossible, since it had not been completed. To read back all of his testimony when the jury obviously was interested only in part would not only have been unresponsive and time-consuming but would have given undue prominence to the testimony of one witness.

Before the jury was called back the Court and counsel, including appellant's counsel who now complains about the way the matter was handled, agreed that the dimension seven feet three inches was measured from the front of the streetcar, and agreed that the record did not define precisely what was meant by "the front of the car." For the expressed purpose of avoiding the reading of a half hour's testimony to the jury, the judge sought the agreement of counsel as to where the piece of straw was found. Counsel for appellant stated it was found seven feet three inches from the front of the car and five feet eight inches above the ground. (J.A. 52, 53). Counsel for appellee agreed. Counsel for appellant checked his notes to verify his measurements and made no objection to the way the judge had worked out the jury's alternative requests. The jury was brought in and was presented with the answers mentioned above. That procedure answered the request contained in the jurors' note.

The jury foreman then asked how far from the rear part of the front door the straw was found. Counsel for appellee stated the measurement and indicated that it was just to the rear of the front doors. At that point, counsel for appellant interjected a statement concerning the molding or edge of the streetcar, a feature of the streetcar about which

the jury had not raised any question, in the following fashion: (J. A. 55).

MR. BINDEMAN: Yes, sir, except that my recollection is that it was on the molding, because there was testimony that Your Honor may remember from Mr. Mason that the straw was right about where the molding was.

THE COURT: Yes, but we don't have the measurement of the molding. But there is no dispute as to measurements.

MR. ROBERSON: No.

MR. BINDEMAN: No, sir.

After further colloquy, the jury foreman, no longer asking for the testimony of any particular witness, asked: (J. A. 56). "Could the point of impact have been the edge, or was it on a flat side of the car?" The Court asked if both counsel were in agreement as to that. Counsel for appellee stated that he did not know the answer to that. Counsel for appellant then stated his version of the facts for the benefit of the jury in open court. He said "It [the point of impact] was on the sharp edge of the projection, Your Honor, which we concede is two and three-quarter inches projecting outward." At the suggestion of counsel for appellee that it was not proper to argue recollection of testimony in front of the jury, counsel went to the bench. After a short colloquy, the judge announced in open court that:

The testimony is, Mr. Foreman, that the point of impact was seven feet three inches back of the front of the streetcar and five feet eight inches from the ground. That is as far as the testimony is undisputed.

Counsel for appellant did not question the way the judge handled the jury's request and made no objection.

Now appellant would argue that the judge was wrong in using this method of giving the jury the agreed facts for which they asked, rather than reading back the entire transcript of Mason's testimony. Now the appellant would also argue that the Court answered the question of the precise location of the straw incorrectly, although counsel stood silent when the trial judge worked out what he considered to be

a satisfactory answer to that added request of the jury. The appellant's position in the location of the straw is not well taken for the following reasons: (1) appellant's counsel failed to object and cannot now be heard to argue that those matters constitute reversible error; and (2) the appellant fails to show that he was in any way harmed by the final resolution of the problem by the trial judge which omitted reference to the "edge" or molding of the streetcar.

Failure to Object

Failure to object to instructions or a failure to object to handling of jurors' requests subsequent to instructions is a waiver of any claimed error in a civil case.

Objections to instructions must be timely, that is, they must be made before the jury retires to deliberate. Joyner v. George Washington University, 100 U.S. App. D.C. 64, 242 F.2d 37 (1957); Crockett Engineering Co. v. Ehret Magnesia Mfg. Co., 81 U.S. App. D.C. 159, 156 F.2d 817 (1946). The duties of counsel are set forth by Rule 51 of the Federal Rules of Civil Procedure which says, in part:

No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

The converse practice would permit counsel to lull a trial court into error and then use the claimed error to secure a new trial if not satisfied with the verdict. See, e.g., the comment of the Municipal Court of Appeals for the District of Columbia, District Hauling & Construction Co. v. Argerakis, 34 A.2d 31, 32, (Mun. App. D.C., 1943), upon a belated contention that the instructions placed the case before the jury on an erroneous theory of damages:

Stated otherwise, counsel having gambled on the jury's verdict and lost, cannot be permitted to make the motion for new trial a vehicle for asserting objections retroactively or for grounding an appeal on a theory never presented during the trial.

Claimed Error Not Harmful To Appellant's Case

As shown above, appellant's counsel interjected the question whether the "sharp edge" was the point of impact into the colloquy between judge, jury and counsel. (J.A. 57). Appellant's brief attempts to capitalize upon the handling of what it terms the jury's question by arguing that the question whether the metal edge or protrusion was located at that point was a vital factor and that to have answered it wrongly did the appellant "great harm and prejudice." (Appellant's brief at p. 18). The appellant's brief makes the fallacious argument that if decedent had walked into the streetcar he would have come into contact with the flat side of the streetcar, whereas if he were struck while merely standing, oblivious, in a position of danger, he would have been struck by the protruding edge.

One walking into the side of a streetcar can walk either into its flat side or any oncoming projecting edge, depending upon when and where he makes his mistake. The other half of appellant's proposition is likewise incorrect. A person not walking, by turning from his right to straight ahead, if he is standing close to streetcar tracks, could bring his straw hat into contact with either an edge or flat side of a streetcar. Appellant cannot get around the fact that the presence of a piece of straw on or near the protruding edge located seven feet three inches back from the front of the streetcar is consistent with decedent's walking into the streetcar.

By way of argument, appellant's brief cites four cases, all of which are inapposite because they deal with reading of the testimony of a witness to the jury. As pointed out above, even though he initially asked that the witness' entire testimony be read, appellant's counsel did not object when the trial judge adopted the superior alternative of supplying the jury the agreed-upon measurements, rather than reading back the testimony. (J.A. 51 et seq.).

Two of the cases cited by appellant, United States v. Hammond, 226 Fed. 849 (N.D. Cal. 1914), reversed on other grounds 246 Fed. 40 (9th Cir. 1917), and Kleinhans v. American Gauge Co., 80 N.E. 2d

626 (Ct. App. Ohio, Montgy. Cnty. 1948), are cited for the proposition that it is not error to read the transcript of a witness' testimony to the jury. That proposition does not figure in this case. It is converse of what the appellant might be trying to establish, i.e., that it is error not to read the transcript of witnesses' testimony to the jury.

Appellant's discussion of James v. Key System Transit Lines, 270 P.2d 116 (Dist. Ct. App. 1st Dist., Div. I, Cal., 1954), points out that the intermediate appellate court regarded as error the judge's refusal to have read back to the jury certain portions of an impeaching pre-trial deposition. Appellant's brief failed to mention that the court held that the mistake did not amount to reversible error inasmuch as there was no substantial impeachment in the deposition. In that respect, that case bears some resemblance to the case at bar, since there was no loss to the jury here in the judge's decision to give the jury the measurements they asked for rather than read back all of Officer Mason's testimony.

Appellant's reliance on the case of Shiers v. Cowgill, 157 Neb. 265, 59 N.W. 2d 407 (1953) is misplaced because that case states the correct rule applicable here that the decision whether to give the jury additional instructions or information lies within the sound discretion of the trial court, and unless the record discloses a manifest abuse of this discretion such action is not error. 59 N.W.2d at 414, 415. In Shiers, the court was upheld in its rejection of a jury request to have the testimony of a safety patrolman read back, even though that request was rejected in the mistaken thought that the trial court was without authority to order testimony read back. The trial court there was upheld because the matter was discretionary. To the effect that the decision to grant or refuse a jury request that the testimony of a witness be read back to them is purely discretionary, see e.g., Florida Power & Light Co. v. Robinson, 68 So.2d 406, 413 (Fla. 1953); Metropolitan Life Ins. Co. v. Smith, 51 Ga. App. 862, 181 S.E. 802, 807 (1935). Since the Court in the case at bar handled the jury's requests correctly, there was in no wise an abuse of its broad discretion.

SPEEDING REGULATIONS HAVE NO
BEARING ON THIS CASE.

Appellant raises the point that the Court was in error in refusing to admit into evidence Regulation 22(c) of the Traffic and Motor Vehicle Regulations of the District of Columbia.⁴ The Court properly excluded the regulation.

From the testimony, it was clear that the streetcar, after initially starting up from its stopped position across 13 1/2 Street from the scene of the collision, slowed as it approached the decedent. (J. A. 34, 35). It was only when the streetcar was abreast of the decedent that it began to pick up speed. (J. A. 36, 38). As the streetcar was alongside of Mr. Wabisky, the operator observed him through the front side doors, and saw him turn and step into the side of the streetcar. While the appellant denies that decedent stepped forward into the streetcar, there is no dispute that Wabisky turned while the streetcar was alongside of him, nor is there any evidence that the streetcar accelerated before it was alongside of the decedent.

On the basis that the streetcar accelerated as it approached, counsel for appellant sought to introduce into evidence § 22(c) of the Traffic Regulations. Regulation 22 is entitled "Speed Restrictions" and deals with driving vehicles at speeds greater than reasonable and prudent. The appellant claims that the judge's refusal to admit the regulation constitutes error.

The short answer to the appellant's contention is that this case is not a speeding case. The appellant's basic contention in this case is that the appellee's operator misjudged the width or clearance of his streetcar and ran into a pedestrian who was standing close to the tracks. Appellant's theory of how the accident happened is not related to any question of speeding. Even the slightest forward motion of the streetcar

⁴ Appellant's brief, p. 19 et seq.

would have caused injury if it involved running against an oblivious person standing in the way. The jury, however, was not persuaded that the accident happened that way, or it would have found for appellant.

The introduction into the case of an issue of speeding was not justified under the circumstances and would only have confused the jury. There was no evidence of excessiveness of speed, only a weak showing that the decedent might have been in the path of the streetcar, in which case any forward movement of the streetcar would have been harmful.

Appellant relies upon two irrelevant cases. One is D. C. Transit, Inc. v. Slingland, 105 U.S. App. D.C. 264, 266 F.2d 465, cert. denied, 361 U.S. 819 (1959). There the accident involved a bus which was allegedly jutting out into a traffic lane in violation of a traffic regulation. In that position, the bus was struck by a mail truck, and a bus passenger was injured. The trial court was upheld in allowing the jury to consider the regulation. The theory behind admitting the regulation was that the jutting position of the bus might have figured in the cause of the accident. It was, so to speak, a jutting-bus accident. On the other hand, the case at bar cannot be termed a speeding-streetcar accident because any forward motion would cause the streetcar to strike an oblivious pedestrian standing in its path.

The second case cited by the appellant, D. C. Transit, Inc. v. Coffey (District of Columbia Ct. App., No. 3208, May 17, 1963), has no bearing on this case. It merely held that the right-of-way regulations are applicable to T-shaped intersections as well as to ordinary intersections.

Appellant's theory of the case was that the decedent was standing oblivious too close to the tracks, and that the operator drove the streetcar against him although he had a last clear chance to avoid the collision. The jury was instructed fully on that theory.

IV

THE PRIOR SIGNED STATEMENT OF THE WITNESS NOLIN WAS UNAMBIGUOUS AND NEEDED NO CLARIFICATION. AN EXPLANATION WAS GIVEN OF ITS INCONSISTENCY WITH HIS TESTIMONY AT TRIAL.

Although the witness Lucien Nolin testified on direct examination that he was a passenger on the streetcar and saw the decedent standing between the safety zone and the south rail of the streetcar tracks (Tr. Vol. I, p. 31) he admitted on cross-examination that on the day of the accident he signed a written statement which contained the following statement:

I did not see this man until after I heard the thump and looked out and saw him flying through the air.

Appellant's brief argues at Section V that the last-quoted statement of Nolin was "an ambiguous instrument" or contained "terms of doubtful import." On that theory appellant's counsel at trial asked Nolin to explain the meaning of the above-quoted statement. (J. A. 24).

The Court correctly cut off that line of questioning with the observation that there was nothing ambiguous about the statement. When counsel for appellant explained that when he used the word "ambiguous" he had in mind that it differed from Nolin's testimony on direct examination, the judge suggested that counsel ask another question or reframe the question. Instead, counsel for appellant abandoned his attempt to get a direct explanation of the matter he considered "ambiguous." After establishing on further redirect that Nolin identified the person whom he saw flying through the air as being the one person with a white shirt who had been standing at the scene before the collision, counsel for appellant asked: (J. A. 25).

Q. Now, when you said you did not see the man, you are talking about the time that the front of the streetcar passed him so that you were blinded?

MR. ROBERSON: I object to leading the witness, Your Honor.

THE COURT: Objection sustained.

A. There was a very --

THE COURT: Just a moment.

MR. BINDEMAN: Just a minute.

THE COURT: Objection sustained.

Q. When you were watching the man did there come any time when you could not see him? A. In the front of the streetcar there is a section of about twenty inches, kind of a round shape, like, that the man kind of disappeared for a few seconds, and then I saw him hit the door.

MR. BINDEMAN: I have no further questions.

By the foregoing leading question and Nolin's answer to it, appellant presented Nolin's explanation of the inconsistency between his testimony and his prior signed statement. Thereupon, the vacillating Nolin, on recross-examination, reaffirmed that the earlier contradictory signed statement was accurate.

Since Nolin's earlier statement was unambiguous, and in view of the explanation of inconsistency which he tendered to the triers of fact, the two parol evidence cases cited by appellant⁵ are inapplicable and require no discussion.

Thus, appellant's counsel, while wrong in his insistence that Nolin be allowed to explain as ambiguous what was clear, nevertheless received the full benefit of an attempted explanation by Nolin to the jury of his inconsistent statements.

CONCLUSION

The trial judge gave a complete and impartial instruction. His response to the jury's note and to the jurors' subsequent questions was correct and not objected to.

The other subsidiary claims of error being similarly without

⁵ Appellant's brief, page 24.

merit, the jury verdict for defendant should be affirmed, rather than to put the parties to the fruitless expense of a third trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Brief for Appellee was served by hand this first day of July, 1963, upon J. E. Bindeman, Esq., and Leonard W. Burka, Esq., Attorneys for Appellant, 606 Landmark Building, Washington 5, D. C.

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